APPENDIX A

Order of Chancery Court Dated March 10, 1964, Directing the Parties to Proceed with the Trial on March 11, 1964.

In the Chancery Court of the First Judicial District of Hinds County, Mississippi.

Hyde Construction Company, Inc., Plaintiff v. Koehring Company, et al., Defendants; No. 60068.

Order Overruling Motion of Defendant for Postponement of Trial

Came on This Day to be heard the third application of defendant to stay the proceedings in this cause and the Court finding that this cause is fully at issue on its merits and has been set for trial since 2:00 o'clock P.M. on Monday, March 9, 1964 but has been delayed from day to day pending various maneuvers of defendant in the Federal Court, and the Court further finding that the parties have been standing by for trial at great inconvenience and expense and that a further delay would amount to extreme hardship and injustice, and that there is no further cause for delay and that this cause should be tried forthwith;

It Is Ordered and Adjudged that the plaintiff's* last application be and the same is hereby denied and the parties are ordered and directed to proceed with the trial of this cause commencing at 2:00 o'clock P.M. on Wednesday, March 11, 1964.

So Ordered on this the 10th day of March, 1964.

J. C. Stennett, Chancellor

Filed March 10, 1964, Charles A. Scott, Chancery Clerk (illegible).

*Should read "defendant's"

APPENDIX B

Injunction Issued by the Oklahoma District Court Against Enforcement of Decree and for Re-Trial but Allowing All Parties to Participate on Koehring's Appeal to the Supreme Court of Mississippi.

Judgment And Order

[5911]

On the 18th day of June, 1964, this cause came on for further hearing in the civil contempt proceeding against Hyde Construction Company, Inc., and Vardaman S. Dunn. Further evidence was heard. There were arguments by counsel and time was given for the filing of briefs pending which the matter was taken under advisement.

At this and previous hearings it is made to appear to the Court that in violation of the temporary restraining order of this Court, Hyde Construction Company, Inc. and its attorney, Vardaman S. Dunn proceeded with and concluded the trial of Cause No. 60068 in the Chancery Court for the First Judicial District of Hinds County, Mississippi, and continuing therewith to the rendition of a judgment therein on April 8, 1964 in favor of Hyde and against Koehring.

Now on this 1st day of September, 1964, It Is Ordered, Adjudged And Decreed by the Court

1. The trial of this case in this Court shall be had and conducted as if said Cause No. 60,068 in the Chancery Court for the First Judicial District of Hinds County, Mississippi had not been tried and as if the judgment therein had not been rendered. Nevertheless, this Court may at any time consider the judgment in said Case No. 60,068 in making final disposition of the matters hereinafter set out and in rendition of its judgment herein.

2. Until the further order of this Court, the plaintiff, Hyde Construction Company, Inc., its officers, agents, servants, employees, assigns, attorneys, and/or any person or corporation acting in concert therewith, be and they thereby are enjoined and restrained from directly or indirectly enforcing or collecting or attempting to enforce or collect in any manner whatsoever any rights or claims under or by virtue of the decree entered under date of April 8, 1964, in said Cause No. 60,068, or any other decree, judgment, motion, action, process, execution, proceeding or order premised thereupon; but nevertheless the ones so restrained may participate in and contest any appeal from said judgment taken by Koehring Company.

3. Subsequent to the issuance of the temporary restraining order herein, Koehring Company has incurred reasonable and necessary expense of $28,866.33 because of the acts of Hyde Construction Company, Inc. and Vardaman S. Dunn in violation of the temporary restraining order. Of this, $9,009.80 is the reasonable and necessary expense in connection with the institution and prosecution of the proceedings in this court concerning contempt, and $19,856.53 is the reasonable and necessary expense in connection with proceedings had in Mississippi arising out of the violation of this Court's temporary restraining order. It Is Therefore Ordered And Decreed by the Court that Hyde Construction Company, Inc. and Vardaman S. Dunn shall be jointly and severally liable for and shall pay to Koehring Company forthwith the said sum of $9,009.80. Whether or not they or either of them shall be required to pay any further sum or sums is reserved for decision until the trial of this case has been concluded in this Court or until the further order of this Court granted for any reason.

4. It Is Therefore Ordered And Decreed By The Court that judgment is hereby entered in the sum of $9,-009.80 against Hyde Construction Company and Vardaman S. Dunn, jointly and severally, and in favor of Koehring Company to reimburse Koehring Company for expenses incurred in connection with the institution and prosecution of the civil contempt proceedings as hereinabove set forth.

5. Jurisdiction of this cause and of this proceeding is retained for all purposes, including the purpose of giving full effect to this order and the making of such further orders and decrees or taking such further action as may be necessary or appropriate.

Allen E. Barrow
United States District Judge

Filed September 1, 1964.

APPENDIX C

Opinions of the Supreme Court of Mississippi, Reported in 178 So.2d 838 and 182 So.2d 580.

KOEHRING COMPANY

v.

HYDE CONSTRUCTION COMPANY, INC.

No. 43572.

Supreme Court of Mississippi.

Feb. 7, 1966.

182 So.2d 580

Butler, Snow, O'Mara, Stevens & Canada, Roger C. Landrum, Jackson, John F. Friedl, W. A. Denny, Milwaukee, Wis., for appellant.

Cox, Dunn & Clark, Barnett, Montgomery, McClintock & Cunningham, Jackson, for appellee.

SMITH, Justice.

Following the affirmance of this case, as reported in 178 So.2d 838 (Miss. 1965), both parties filed suggestions of error, with supporting briefs. Replies from each side, also supported by briefs, were filed in response to a request of this Court.

We have now reviewed the entire case in the light of the excellent briefs submitted by both sides and have concluded that we should adhere to our former opinion and that both suggestions of error should be overruled.

During the pendency of the suggestions of error, the United States Supreme Court, in an opinion delivered January 17, 1966, in 86 S.Ct. 522, styled Koehring Co. v. Hyde Construction Co., Inc., reversed the decision of the

United States Circuit Court of Appeals, 10th Circuit, reported as Hyde Construction Company v. Koehring Company, 348 F.2d 643 (10th Cir. 1965), and held that the United States District Court for the Northern District of Oklahoma had acquired jurisdiction in that case on March 11, 1964.

As we read the January 17, 1966, decision of the United States Supreme Court, referred to above, it does not reach the question of the jurisdiction of the Hinds County Chancery Court to render the decree affirmed by this Court.

The suggestions of error filed by appellant and by appellee are overruled.

Suggestions of error overruled.

All Justices concur.

ON MOTION TO CORRECT JUDGMENT

RODGERS, Justice.

The appellee, Hyde Construction Company, filed a motion to correct the judgment heretofore entered in the above-styled cause on the following ground: The amount set out in the judgment of the Court in favor of appellee is excessive since the original amount of $468,450.08 included not only $51,733.71 for "winter protection", plus $3,155.76, interest to April 1, 1963, but also $3,163.72 interest from April 1, 1963, to April 8, 1964. In the original judgment of this Court, we subtracted from the original amount allowed by the chancellor in the trial court, the sum of $54,889.47, the total for winter protection and interest to April 1, 1963. However, we did not subtract the interest which was included in the judgment, in the sum of $3,163.72 interest from April 1, 1963, to April 8, 1964.

[1, 2] We are of the opinion that the judgment of this Court should be corrected by subtracting from the total amount allowed by the chancellor, $464,450.08—the total sum of the "winter protection" $51,733.71—plus the two items of interest on the winter protection, making a total sum of $58,053.19, leaving a balance of $406,396.89 due by the appellant Koehring Company to the appellee Hyde Construction Company, Inc. The judgment should allow six percent interest from and after April 8, 1964, on the balance due to the appellee.

[3] It is next contended by the appellee that the judgment of the Court should be amended to include the surety on appellant's supersedeas bond, the Fidelity and Deposit Company of Maryland. We agree that the judgment should be amended so as to include the judgment against the Fidelity and Deposit Company of Maryland, surety on appellant's supersedeas bond, so as to make appellant and the surety jointly liable for the judgment in favor of Hyde Construction Company against Koehring Company. Mississippi Code Ann. § 1973 (1956).

[4] The appellee contends that the judgment in this case should be amended to apportion the cost of appeal between appellant and appellee because this Court affirmed eighty-seven percent of the amount allowed by the judgment and decree of the chancery court, and appellee should not be required to pay all of the cost of appeal. We also agree with this argument, and the judgment is amended so as to charge fifty percent of the cost of appeal to appellant Koehring Company and fifty percent of the cost of appeal to Hyde Construction Company. Miss.Code Ann. § 1971 (1956); Illinois Cent. R.R. Co. v. George, 241 Miss. 233, 130 So.2d 260 (1961); Shipman v. Lovelace, 215 Miss. 141, 60 So.2d 559 (1952); Barry v. Wingfield, 126 So. 842 (Miss.1930).

[5] Finally, it is claimed by appellee Hyde Construction Company, Inc. that it should be allowed five percent damages on the balance of $406,396.89, due appellee, and that the order of the Court should be amended so as to allow such damages. We are of the opinion that this contention is not well-taken. The judgment should not allow damages of five percent. See Miss. Code Ann. § 1971 (1956); Illinois Cent. R.R. Co. v. George, supra; Boyd v. Applewhite, 123 Miss. 185, 85 So. 87 (1920).

The Clerk of the Supreme Court is hereby directed to amend the judgment of this Court entered in Minute Book BN at page 423, dated October 8, 1965, so as to comply with the amendments directed to be made, as above set out.

So ordered.

All Justices concur.

KOEHRING COMPANY

v.

HYDE CONSTRUCTION COMPANY, INC.

No. 43572.

Supreme Court of Mississippi.

Oct. 4, 1965.

178 So.2d 838

Butler, Snow, O'Mara, Stevens & Canada, Roger C. Landrum, Jackson, John F. Friedl, W. A. Denny, Milwaukee, Wis., for appellant.

Cox, Dunn & Clark, Jackson, for appellee.

RODGERS, Justice:

This case grew out of the following facts and circumstances: On November 18, 1959, a contract was awarded

to Hyde Construction Company, Inc. in the amount of $16,173,876.86 for the construction of a large concrete spillway, Keystone Dam, Arkansas River, in the State of Oklahoma. The specification of the United States Corps of Engineers, as incorporated in the contract, required that the contractor erect a suitable concrete plant of sufficient capacity to satisfactorily batch, mix and discharge two hundred cubic yards of concrete per hour, and sixteen hundred cubic yards of concrete in any eight-hour shift. The specifications also required that the concrete be placed in the facility at a certain temperature. The Hyde Construction Co., Inc. (hereinafter called Hyde) went about securing a plant and equipment that would produce a concrete mix required by the contract, and entered into negotiations with the Koehring Company (C. S. Johnson Company, Division, hereinafter called Koehring) for the purchase of a plant to manufacture the required mix.

Koehring proposed the installation of a cooling and heating facility, which was to operate on a vacuum principle. Hyde was experienced in the operation of a concrete mixing plant of similar make and design which had been previously sold and offered by Koehring, but had had no experience with the proposed vacuum cooling system or equipment necessary to control the temperature of the mix proposed to be manufactured by Koehring. A contract was negotiated between the appellant and appellee on February 5, 1960, in which Koehring guaranteed that its cooling plant would operate to the satisfaction of Hyde, but it is charged that the plant failed to operate as guaranteed and as a result of the failure of the plant and system to operate and produce the required cement mix from the date of installation, the progress of the work on the Keystone Dam Project was thereby greatly delayed, resulting in many "shut-downs" and periods of loss

of time and labor efficiency, resulting in great damage to Hyde in the sum of $500,000.

On August 30, 1961, in Civil Action No. 3175, Hyde exhibited its complaint in the Federal Court at Jackson, Mississippi, wherein it sought a money judgment against Koehring for the breach of the contract and warranty set out in the sale contract for the concrete mixing and cooling plant. This bill of complaint also made two companies defendants by way of attachment. Dalrymple Equipment Company was named attachment defendant in the State and Federal Courts. It was alleged that each of the attached defendants knew of other residents having effects of the non-resident defendant Koehring and others who were indebted to it. Attachment was requested under the method set out in Mississippi Code Annotated sections 2729 through 2734, inclusive (1956).. The complaint also charged that there was diversity of citizenship existing between the complainant on the one hand and Koehring (C.S. Johnson Division) on the other. The complaint asks that the court enter a decree in favor of the complainant, jointly and severally, against the non-resident defendant in the full sum of $500,000, with legal interest and the cost of court, and that the funds and effects in the hands of the attached defendants be condemned for the satisfaction in whole or in part of a money decree. It requests that judgment be entered as provided by law in such cases against the attached defendants upon a recovery of judgment. The bill of complaint alleged that Koehring was a foreign corporation, doing business in Mississippi, without having qualified and appointed an agent for process, thereby calling into play the statute which designated the Secretary of State as agent for process. Koehring filed no answer in the Federal action, but instead filed a special appearance in the form of a motion to dismiss for want of jurisdiction.

Koehring's motion to dismiss the Federal action for lack of jurisdiction also included a request in the alternative, that the court transfer the case to the Federal District Court of Oklahoma under section 1404(a), Title 28 U.S.C.A. This motion was overruled; whereupon, Koehring appealed to the Court of Appeals of the Fifth Circuit. Thereafter, on September 27, 1961, while the above-mentioned suit was pending in the Federal District Court at Jackson, Hyde filed a suit in the State Chancery Court of the First Judicial District of Hinds County, Mississippi, setting out an identical cause of action theretofore filed by Hyde in the Federal Court.

In the State Chancery Court suit, Hyde also invoked a non-resident or attachment statute of Mississippi and Dalrymple Equipment Company again was made a resident attachment-defendant. The State Chancery Court action remained relatively dormant while proceedings were had on Koehring's appeal from the decision of the Federal Court in Mississippi.

While the appeal in the Fifth Circuit was pending in the Federal Court suit, Koehring filed its answer in the State court on January 30, 1963, thereby entering its appearance in the Chancery Court proceedings. In this answer, Koehring pleaded the pendency of the prior Federal court action, and alleged that the issue in the former Federal Court suit and the issue set out in the State Chancery Court suit was the same, and that the prior Federal Court suit was brought as a *quasi in rem* proceeding. Koehring requested in its answer that the Chancery Court suit should be dismissed or stayed, pending the disposition of the earlier filed Federal Court action. However, no plea in abatement was filed and no proof of a restraining order was made prior to the entry of the final decree in the

State Chancery Court. On September 19, 1963, the Court of Appeals for the Fifth Circuit, 324 F.2d 295, rendered an opinion in the Federal Court proceeding which pretermitted the jurisdictional question, but reversed the lower U. S. Court directing that the Federal Court suit be transferred to the First District for the Northern District of Oklahoma.

After the U. S. Fifth Circuit Court had rendered its opinion, Hyde requested that the State Chancery Court suit be set for trial. Koehring requested that the state court stay or dismiss the proceeding because of the prior proceedings filed in the Federal Court but this motion was overruled. The Chancery Court then set the state case for trial to be held Monday, March 9, 1964. During this time, Hyde had filed a petition for rehearing in the U. S. Fifth Circuit, and Koehring had filed in the same court a motion for an injunction to restrain Hyde from proceeding to trial in the State Chancery Court suit. On January 27, 1964, this motion was overruled without prejudice to Hyde's right to apply to the Oklahoma Federal District Court, to which the case was remanded, for a transfer back. February 5, 1964, the Fifth Circuit denied Hyde's petition for a rehearing. On February 14, 1964, the U. S. Fifth Circuit issued its mandate reversing the District Court's previous judgment of September 19, 1963, which *inter alia* "ordered and adjudged" that the case "be and it hereby is remanded to the * * * Court for the Mississippi Southern District with instructions that it be transferred to the Northern District of Oklahoma. * * *" Thereupon, Hyde attempted to dismiss his action in the Mississippi Federal Court. After the District Court entered an order of dismissal on February 24, 1964, Koehring petitioned the U. S. Fifth Circuit Court for a writ of mandamus to have the dismissal order vacated and the

action immediately transferred to the Oklahoma Federal District Court.

The hearing on the petition for a writ of mandamus in the U. S. Fifth Circuit (by order dated March 6, 1964) temporarily enjoined Hyde from proceeding further in the Mississippi Chancery Court action. On March 10, 1964, the Fifth Circuit Court of Appeals held that the Federal District Court in Jackson had committed error in allowing Hyde to dismiss the Federal Court suit. Thereupon, the Fifth Circuit Court directed a vacation of the order of dismissal which had been entered by the Federal District Court in Jackson on February 24, 1964, and ordered the Clerk of the Federal Court in Jackson to immediately transfer the record in that case to the Clerk of the Federal Court of the Northern District of Oklahoma. It further ordered that pending the physical filing of that order in the Oklahoma Court, the Fifth Circuit's order would "constitute a transfer to enable the parties to present the matter to the District Court in Oklahoma.". The U. S. Fifth Circuit Court found that the immediate transfer to Oklahoma would protect and effectuate the order of the Fifth Circuit Court, and thereupon vacated the temporary injunction restraining Hyde from proceeding further in the Chancery Court action. The cause thus transferred to the Oklahoma Federal District Court became Civil Action No. 5911 on the docket of that court.

Although, as previously stated, the Mississippi Chancery Court suit was set for trial on March 9, 1964, it was continued for hearing until March 11, 1964. At a hearing, participated in by counsel for both Hyde and Koehring on March 11, 1964, the Federal District Court in Oklahoma, prior to 2 P.M. and prior to the commencement of the trial in the State Chancery Court suit, issued a tempo-

rary restraining order against Hyde, its attorneys and those in concert with them, from proceeding with the trial in the State Chancery Court. Notice of a temporary restraining order was transmitted to Jackson *by telephone* and announced in open court at the outset of the trial, and the attorneys for Koehring requested that Koehring be granted permission to refrain from proceeding in the Chancery Court suit. Nevertheless, the State Court directed that the case proceed to trial as previously ordered.

The Chancery Court proceeded with the trial of this cause until it was completed on March 25, 1964. On April 7, 1964, the Chancery Court rendered an opinion in favor of Hyde, and on April 8, 1964, entered a final decree in favor of Hyde, against Koehring, awarding a money-judgment in the sum of $464,450.08. Thereafter, Koehring filed a petition in the State Chancery Court asking for a rehearing, and asking the court to vacate its former decree. This petition set forth, among other things, that Hyde should not have been permitted to have proceeded in the Chancery Court suit after *notice* of the various restraining orders issued by the Oklahoma Federal District Court. A response was filed by Hyde to this petition, and the petition was overruled. Koehring perfected the present appeal with supersedeas from the money-judgment of April 8, 1964. Thereafter, on September 1, 1964, the Oklahoma Federal District Court rendered an opinion, ordering and adjudging in that Court (in Civil Action No. 5911) that sanctions be imposed against Hyde and its attorneys for contempt of court.

I

STATE COURT JURISDICTION

The question then to be determined in the outset is, whether or not the Federal Court, having first acquired

jurisdiction of the subject-matter and the parties, had *exclusive* jurisdiction, so that the Chancery Court of Mississippi had no jurisdiction to try the case filed in the State Court.

The conflict in jurisdictions of the Federal and State Courts under our system of government had given rise to considerable controversy in the various opinions of courts, both of the states and of the Federal jurisdictions. It is pointed out in 21 C.J.S. Courts § 522 (1940) at p. 791 that:

> "The courts of the United States and the courts of the various states are independent of each other, except as judgments of state courts are subject to review by the federal supreme court, as indicated in the C.J.S. title Federal Courts §§ 238-271 * * *. So ordinarily the pendency of a suit in a federal court is not a bar to a suit in a state court involving the same controversy, and vice versa. However, the two courts are not foreign to each other; they form one system of jurisprudence, which constitutes the law of the land, and should be considered as courts of the same country, having jurisdiction partly different and partly concurrent, and as a matter of comity one of such courts will not ordinarily determine a controversy of which another of such courts has previously obtained jurisdiction. * * *"

[1-3] As a general rule, the grant of jurisdiction to the Federal Courts does not of itself imply that the jurisdiction is to be exclusive. So, where a right of action, given by a statute of the United States, is an advancement of the common-law right, existing independently of the relation of Congress in pursuance of the powers delegated by the Constitution of the United States, the concurrent jurisdiction of the State Court is not taken away. Also, where the State Courts have long enjoyed jurisdiction over the subject-matter of an action, jurisdic-

tion is not withdrawn by federal statute unless such an intention is distinctly manifested.

The author sets out in the textbook, Moore's Federal Practice, 1A, 2d Edition, section 0.221 (1965) at pages 2605, 2606, the following:

> "Where the federal and state courts have concurrent jurisdiction, as, for example, in diversity and general federal question cases, actions *in personam* may proceed concurrently. In other words, as stated in some of the cases, 'the rule * * * has become generally established that where the action first brought is *in personam* and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded.'"

Kline v. Burke Construction Co., 260 U.S. 226, 230, 43 S.Ct. 79, 67 L.Ed. 226, 24 A.L.R. 1077 (1922); Equitable Life Assur. Soc. of the U. S. v. Wert, 102 F.2d 10 (C.C.A.8th, 1939); Byrd-Frost, Inc. v. Elder, 303 U.S. 647, 58 S.Ct. 646, 82 L.Ed. 1108 (C.C.A.5th 1937), 93 F.2d 30 (1938).

This textwriter also points out in section 0.222 at pages 2607-2610, inclusive, that:

> "In addition to the situation previously discussed, where two *in personam* suits may proceed concurrently, two actions may proceed without interference where one is *in rem* and the other is *in personam*, for irreconcilable conflict arises only when both actions seek to dispose of the same *res*. Thus, where the state court has control of the administration of a decedent's or a ward's estate, an action *in personam* may be instituted in the federal court, the requirements of federal jurisdiction being satisfied, to establish the validity and amount of a claim against the estate, since the federal court's action in no way interferes with the state court's control of the *res*. * * *

"* * * Generally, in all cases where the federal action is *in personam* or partly so, even though it includes *in rem* issues which partly overlap the prior jurisdiction of state courts, 'the federal court should proceed to grant any relief appropriate under the pleadings which will not interfere with the specific properties which have been brought within the jurisdiction of the state courts.'

"Therefore, subject to the rule that one court, federal or state, shall not disturb the possession and control of specific property which is within the prior jurisdiction of the other court, one court may properly adjudicate rights in property in the possession of the other court and may render any judgment 'not in conflict with that court's authority to decide questions within its jurisdiction and to make effective such decisions by its control of the property.'

"In United States v. Klein, (303 U.S. 276, 281, 58 S.Ct. 536, 82 L.Ed. 840, 1938) a leading case in point, the question was whether a judgment of a Pennsylvania court, rendered under authority of a state statute and affirmed by the state Supreme Court, declaring an escheat to the state of money which had been deposited in the Treasury of the United States, was an invasion of federal sovereignty and the prior jurisdiction of the federal court which had disposed of the fund. In an earlier federal action brought by secured bondholders to compel payment of the bonds, plaintiffs had obtained a decree in behalf of themselves and other bondholders similarly situated, the money was paid into court, and the part of the money belonging to bondholders who had made no claim and could not be found had eventually been (re)covered into the federal Treasury. After the lapse of years the Pennsylvania courts declared the money so deposited to be escheated to the state. It was held that there was no conflict with federal authority; that the state decree was merely an adjudication upon the title of the

absentees, which was not prohibited, and that the decree was not founded on possession and did not purport to disturb the possession of the Treasury as depository, which it could not do, and that the question of possession would be open for decision whenever application was made to the federal court for payment over of the fund. (Citation supplied.)

"The same principle was approved and applied by the Supreme Court in the decision of Fischer v. American United Life Insurance Company." (314 U.S. 549, 62 S.Ct.380, 86 L.Ed. 444, 1942, re'g—C.C.A.8th, 1941, 117 F.2d 811) (Citation supplied.)

The appellant contends that it is well-settled that where an action is *quasi in rem,* the court having jurisdiction, first attached, has jurisdiction to proceed to the exclusion of all other courts. It is contended that the case of Donovan v. City of Dallas, 377 U.S. 408, 84 S.Ct. 1579, 12 L.Ed.2d 409 (1964), and the case of Princess Lida of Thurn v. Thompson, 305 U.S. 456, 59 S.Ct. 275, 83 L.Ed. 285 (1938), settled the issue here involved in favor of Koehring.

The facts in the Donovan case are as follows:

The City of Dallas, Texas, owned Love Field, a municipal airport, and forty-six citizens brought a class suit in a Texas court to restrain the City from building an addition to the runway to the airport, and from issuing and selling municipal bonds for that purpose. The case was tried and summary judgment was given for the City. On appeal, the Texas Court of Civil Appeals affirmed. The Supreme Court of Texas denied review, the United States Supreme Court denied certiorari. Later, one hundred and twenty Dallas citizens, including twenty-seven of the plaintiffs in the earlier action, filed another action in the U. S. District Court for the Northern District of

Texas seeking similar relief. The complainants sought an injunction against the construction of the runway, issuance of bonds, and payment of bonds already issued. The City filed a motion to dismiss, and an answer to the complaint in the Federal Court. At the same time, the City applied to the Texas Court of Civil Appeals for a writ of prohibition to bar all plaintiffs in the case in the U. S. District Court from prosecuting their case in that court. The Texas Court of Civil Appeals denied relief, holding that it was without power to enjoin litigants from prosecuting an action in the Federal Court, and that the defense of res judicata on which the City relied could be raised and adjudicated in the United States District Court. On appeal from the mandamus order, the Supreme Court of Texas took a different view, however, and held it was the duty of the Civil Court of Appeals to prohibit the litigants from further prosecuting in the U. S. District Court, and stated that a writ of mandamus would issue should the Court of Civil Appeals fail to perform the duty. The U. S. District Court, in an unreported opinion, dismissed the case pending there. One of the petitioners in the Federal Court excepted to the dismissal and appealed to the U. S. Court of Appeals for the Fifth Circuit. The Texas Court of Civil Appeals cited Donovan and the other complainants for contempt. Donovan was sentenced to twenty days in jail. Donovan served the sentence and the Supreme Court granted certiorari to review the State Supreme Court's judgment directed to the Civil Court of Appeals to enjoin petitioners from prosecuting their action in the Federal Court, and granted certiorari to review the Civil Court of Appeal's judgment conviction of contempt. The Court held that:

> "We think the Texas Court of Civil Appeals was right in its first holding that it was without power to en-

join these litigants from prosecuting their federal-court action, and we therefore reverse the State Supreme Court's judgment upsetting that of the Court of Appeals. We vacate the later contempt judgment of the Court of Civil Appeals, which rested on the mistaken belief that the writ prohibiting litigation by the federal plaintiffs was 'valid.'" 377 U.S. at 411-412, 84 S.Ct. at 1582.

The Court then said:

"Early in the history of our country a general rule was established that state and federal courts would not interfere with or try to restrain each other's proceedings. That rule has continued substantially unchanged to this time. An exception has been made in cases where a court has custody of property, that is, proceedings *in rem* or *quasi in rem*. In such cases this Court has said that the state or federal court having custody of such property has exclusive jurisdiction to proceed. Princess Lida [of Thurn] v. Thompson, 305 U.S. 456, 465-468, 59 S.Ct. 275, 280, 281, 83 L.Ed. 285. In Princess Lida this Court said 'where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other.' Id., 305 U.S. at 466, 59 S.Ct. at 280. See also Kline v. Burke Construction Co. 260 U.S. 226, 43 S.Ct. 79, 67 L.Ed. 226." 377 U.S. at 412, 84 S.Ct. at 1582.

The opinion of the Court then pointed out:

"But plaintiffs in the second suit chose to file that case in the federal court. They had a right to do this, a right which is theirs by reason of congressional enactments passed pursuant to congressional policy. And whether or not a plea of *res judicata* in the second suit would be good is a question for the federal court to decide. While Congress has seen fit to authorize

courts of the United States to restrain state-court proceedings in some special circumstances, it has in no way relaxed the old and well-established judicially declared rule that state courts are completely without power to restrain federal-court proceedings in *in personam* actions like the one here. And it does not matter that the prohibition here was addressed to the parties rather than to the federal court itself. For the heart of the rule as declared by this Court is that:

> "* * * where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. * * *" (Emphasis supplied.) 377 U.S. at 412, 84 S.Ct. at 1582.

In the case of Penn. General Casualty Company v. Pennsylvania ex rel. Schnader, Attorney General, 294 U.S. 189, 55 S.Ct. 386, 79 L.Ed. 850 (1934), the United States Supreme Court said:

> "Where the judgment sought is strictly *in personam*, for the recovery of money or for an injunction compelling or restraining action by the defendant, both a state court and a federal court having concurrent jurisdiction may proceed with the litigation, at least until judgment is obtained in one court which may be set up as *res adjudicata* in the other. See Buck v. Colbath, supra, (3 Wall. 334, 342, 18 L.Ed. 257, 260); Kline v. Burke Construction Co., 260 U.S. 226 [43 S.Ct. 79, 67 L.Ed. 226] * * *. But, if the two suits are *in rem* or *quasi in rem*, requiring that the court or its officer have possession or control of the property which is the subject of the suit in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other. To avoid unseemly and disastrous conflicts in the administration of our dual judicial system, see Peck v. Jenness, 7 How. 612, 625, 12 L.Ed. 841; * * * and to protect the judicial processes

> of the court first assuming jurisdiction * * * the principle, applicable to both federal and state courts, is established that the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other. This is the settled rule with respect to suits in equity for the control by receivership of the assets of an insolvent corporation." (Emphasis supplied.)

In the case of Wells v. Helms, 10 Cir., 105 F.2d 402 (1939), the United States Circuit Court of Appeals, Tenth District, pointed out that:

> "It is well settled that where two, actions involving the same cause of action are pending in a state and a federal court, and are within the concurrent jurisdiction of each, both actions, in so far as they seek relief *in personam,* may proceed at the same time and when one action has gone to judgment, that judgment may be set up in the other action as res judicata." 105 F.2d at 404.

Kline v. Burke Construction Company, 260 U.S. 226, 230, 43 S.Ct. 79, 67 L.Ed. 226, 24 A.L.R. 1077 (1922), gives this exposition:

> "* * * a controversy is not a thing, and a controversy over a mere question of personal liability does not involve the possession or control of a thing, and an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of res adjudicata by the court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law arising in the progress of the case."

[4] Thus it is seen that exclusive jurisdiction vests in the court first acquiring jurisdiction in *in rem* and *quasi in rem* cases but not in *in personam* cases. The question then resolves itself into the query as to what is meant by the expressions "in personam", "in rem" and "quasi in rem" jurisdiction. In 20 Am.Jur.2d, Courts, section 118 (1965), at page 473, we find the following language:

> "The distinction between jurisdiction *in personam* and jurisdiction *in rem*, which to some extent is covered also in other articles, runs through numerous cases, mostly in connection with the doctrine, established by the United States Supreme Court in the case of Pennoyer v. Neff, (95 U.S. 714, 24 L. ed. 565) that a state court can acquire jurisdiction *in personam* over a defendant only if process has been served on him in person in the state to which the court belongs, unless he has voluntarily submitted himself to the court's jurisdiction, some later cases noting a tendency to deviate from strict application of the doctrine of Pennoyer v. Neff, notably through use of the 'minimum contacts' test.'" (Emphasis and citation supplied.)

Section 119, 20 Am.Jur.2d, Courts (1965) at pages 473, 474, 475 states:

> "A decision in personam imposes a responsibility or liability upon a person directly and therefore binds him personally with regard to every property he possesses, even that over which the court has no jurisdiction *in rem*, and which its decision may therefore not directly affect. On the other hand, a decision *in rem* does not impose responsibility or liability upon a person directly, but operates directly against that particular thing which is called the *res*, irrespective of who is the owner or possessor thereof, and irrespective of whether the owner is subject to the jurisdiction of the court *in personam*. * * *

"* * * Jurisdiction *in rem* is right where the decision sought is of a nature to directly affect real property. A court of one state has no jurisdiction to establish, to pass, or to quiet title to real property situated in another state, or to make any other decision directly affecting real property located in another state, or the title to that real property.

"A decision *in personam* may be rendered by the court of a state with regard to a *res* which is not situated within the state if the decision merely obliges a person subject to its jurisdiction in personam to dispose of the *res*, or to refrain from disposing of it, in the manner prescribed by the decision. * * *" (Emphasis supplied.)

Section 120, 20 Am.Jur.2d, Courts (1965) at pages 475, 476, states:

"According to certain judicial opinions, the classification of jurisdiction as *in personam* or *in rem* is not comprehensive enough, and therefore a third category, jurisdiction *quasi in rem*, has been added. The courts seem not to be in harmony, however, as to the exact meaning of that term and its proper application. Jurisdiction *quasi in rem* has been said to be neither strictly *in personam* nor strictly *in rem*. The term is frequently used to designate an action in personam where a *res is indirectly affected by the decision*. But sometimes proceedings affecting a status or relation, for instance a marital status, are referred to as proceedings quasi in rem." (Emphasis supplied.)

The facts in the case at bar on the question now being discussed have been previously studied and a very comprehensive opinion has been written on this subject. See Dunn v. Stewart, D.C., 235 F.Supp. 955 (1964). In that case the Court said:

"The record before this Court in this case, as it relates to the case in the Chancery Court of Hinds

County, Mississippi, demonstrates that the Chancery Court action, being between a Mississippi corporation and a Wisconsin corporation, then contending that it was not doing business in Mississippi, was fully removable. The presence of the attachment defendants in nowise affected removability. Cramer v. Phoenix Mutual Life Ins. Co. (CA 8), 91 F.2d 141, cert. den. 302 U.S. 739, 58 S.Ct. 141, 82 L.Ed. 571, rehearing den. 302 U.S. 778, 58 S.Ct. 263, 82 L.Ed. 602. Having elected not to remove or attempt to remove the Chancery Court action, Koehring Company should now be estopped in equity to assert that any irreparable injury occurred to it because discovery procedures available in the Chancery Court of Mississippi were not as efficacious as procedures which would have been available in the Federal forum.

"A deliberate examination of the pleadings in Civil Action No. 5911 (formerly Civil Action No. 3175), and in the State Chancery Court proceeding No. 60,068, discloses that both suits, insofar as the Defendant Koehring Company is concerned, were *in personam* actions. Only a money judgment was sought as to them. Black's Law Dictionary, 4th Ed. 899; 21A Words & Phrases, pp. 278-287; Ravesics v. Martin, 190 Miss. 92, 199 So. 282, 285. The Chancery Court attachment proceedings, appurtenant to the principal litigation there and the Chancery attachment proceedings in the U. S. District Court, involved one common attachment defendant, Dalrymple Equipment Company, Inc., a Delaware corporation qualified to do business in the State of Mississippi.

"Attachments in Chancery in the State of Mississippi are unique proceedings in the field of attachment law in the sense that the service of the attachment defendant does not bring any fund into the possession, custody or control of the Court, no monies are paid into the registry of the Court, and no bond is required. Mississippi Code 1942, §§ 2729-2734. Garnishment

will not lie against the attachment defendant at the initiation of the action. As the Supreme Court of Mississippi pointed out in Gulf Refining Co. v. Mauncy, 191 Miss. 526, 3 So.2d 844, the Chancery attachment defendant occupies no security position at all; '(h)e is simply a defendant with all the rights and privileges as such and should simply be summoned to answer the suit as any other defendant is summoned.' The distinctions between Mississippi Chancery attachments and attachments at law are also discussed in Mid-South Paving Co. v. Trinidad Asphalt Mfg. Co., 197 Miss. 751, 21 So.2d 646, 647 [20 So.2d 834, 22 So.2d 497]. Sequestration, injunction and delivery to the Plaintiff under bond are all permissible under the Chancery attachment statutes, but none of these procedures were requested or accomplished in either suit.

"Under the laws of Mississippi, Koehring Company could have entered a special appearance in the Chancery Court to challenge the jurisdiction acquired by attachment. It chose not to do so but defended generally, thus granting to the Court general jurisdiction of the person. Mobile & Ohio R. Co. v. Swain, 164 Miss. 825, 145 So. 627. When it made this election it made the issue of any quasi in rem proceedings as to Dalrymple Company mainly moot. Cf. Pennoyer v. Neff, 95 U.S. 714, 725, 24 L.Ed. 565. In no sense had any fund been taken into the hands of the U. S. District Court in Mississippi by making Dalrymple an attachment defendant. When Dalrymple Company's answers are considered together, they disclose that on the three separate dates on which statements of account between Dalrymple Company and Koehring Company were made, a different set of debt relationships existed on each occasion. Obviously, no funds were actually frozen in Dalrymple Company's hands.

"The attachment did not create any conflict between the concurrent State and Federal jurisdictions. Byrd-

Frost, Inc. v. Elder, supra, is completely analogous to the proceedings here involved.

"Dalrymple Company's answer in the Chancery Court advances the plea to that court that it has already been attached in the Federal Court proceedings and a certified copy of the Complaint in the Federal Court action is made an exhibit to Dalrymple's answer in the Chancery Court. Thus, if any funds *had* been taken into custody by the Federal Court proceeding, the Chancery Court, after this notice, would have been bound not to deal with these funds. This Court, of course, must presume that the Chancery Court of Hinds County would take no proceedings which would in any way affect property which was in fact already seized under the proper processes of the U. S. District Court. Rather, the presumption is that the Chancellor would deal correctly with any such claim when, as and if he would take steps to possess or control any part of the attachment subject matter. Douglas v. New York, N. H. & H. Railroad Co., 279 U.S. 377, 49 S.Ct. 355, 73 L.Ed. 747; Harrison v. NAACP, 360 U.S. 167, 79 S.Ct. 1025, 3 L.Ed.2d 1152."

Judge Griffith, in his Mississippi Chancery Practice, original volume, section 484 (1925), at page 516 points out: "The proceeding is one primary *in rem;* and in order to give jurisdiction in chancery by attachment against a non-resident there must exist the following factors: (1) The non-residence of the debtor; and, (2) either (a) that he owns lands in this state, or (b) that there are effects belonging to him in the hands of a person in this state, or (c) that there is some person in this state indebted to the said non-resident debtor, and (3) the issuance of the proper process against the land, or effects, or debt, as provided by the statute, so as to bring the *res* under the control of the court; and it is well settled that when the jurisdictional facts do not exist the proceedings must be dis-

missed, even though the non-resident defendant has appeared, provided that in his appearance he raise at the outset the defect as to jurisdiction, and thus does not waive it. * * * And moreover, when the jurisdiction is based upon the ground that there is a resident defendant who has in his hands effects of, or is indebted to, the non-resident debtor, not only must the resident defendant be such a person as may be joined, but actually he must be made a co-defendant to the suit. * * *"

It will be noted that our attachment proceeding set out in Mississippi Code Annotated section 2729 (1956) ends with the following sentence: "The court shall give a decree in personam against such non-resident, absent or absconding debtor if summons has been personally served upon him, or *if he has entered an appearance.*" (Emphasis supplied.)

[5] From the foregoing facts and authorities, we have reached the conclusion that the Federal District Court in Oklahoma only had *in rem* jurisdiction over the debt owed by Dalrymple to Koehring. Thus, the Federal Court could enjoin the attempted proceedings in the Mississippi Chancery Court only insofar as the dual proceedings to affect the *res* as to the Dalrymple debt—allegedly within the jurisdiction of the Federal Court. The Mississippi Chancery Court decree, however, was a personal judgment against Koehring; it in no way affected Dalrymple's debt to Koehring and the *res* held in the jurisdiction of the Federal Court. It appeared, therefore, the Mississippi judgment is not affected by the Federal injunction and prior proceedings in the Federal Court.

At this point, it should be again noted that the defendant Koehring chose to answer in the State Court, and made no effort to transfer the case to the Federal Court,

as was pointed out by Judge Mize in his opinion in Dunn v. Stewart, supra. In fact, no point was made by Koehring that the complainant Hyde had filed the case in the Federal Court (except in his answer) until pleadings had been filed after the decree had been finally entered by the Chancery Court. It follows that the State Court had jurisdiction to hear and determine the issue joined between the appellant Koehring Company and Hyde Construction Company, Inc., appellee. Particularly in view of the fact that the State Court did not attempt to adjudicate or interfere with the *res* involved in the jurisdiction of the Federal Court and between the parties in that court. We are of the opinion, therefore, that the assignment of error on this point is not well-taken.

By way of emphasis, we also point out that we have consistently held, as a matter of comity, that Mississippi would recognize injunctions issued by another state against its citizens to prevent them from bringing suit in Mississippi to avoid the law of that state. Fisher v. Pacific Mut. Life Ins. Co., 112 Miss. 30, 72 So. 846; Equitable Life Assur. Soc. of the U. S. v. Gex' Estate, 184 Miss. 577, 186 So. 659. The injunctions discussed in these cases are, however, injunctions issued by foreign states, and against persons and corporations subject to their jurisdictions. Moreover, these injunctions are against the individuals and not the courts. 43 C.J.S. Injunctions § 50 (1945),

[6, 7] We recognize that the Federal Court, however, has power to enjoin state court proceedings to protect its jurisdiction over the *res*. 28 U.S.C. § 2283 (State of State court proceedings); De Korwin v. First National Bank of Chicago, 136 F.Supp. 720, (N.D.Ill.1955), 235 F.2d 156 (1956); Alabama Vermiculite Corp. v. Patterson, 149 F.Supp. 534 (W.D. SC 1955). This power however, does

not warrant a Federal Court in enjoining state proceedings, *in personam* or otherwise, that do not interfere with the Federal Court's *in rem* jurisdiction. Albuquerque National Bank v. Citizens National Bank of Abilene, 212 F.2d 943 (C.A. 5th 1954).

[8] Although it may be said that our Mississippi courts have historically recognized the restraining orders of courts of other jurisdictions which have been brought to their attention by way of proper plea, as in the instant case, it is apparent that the trial court cannot be criticized, and certainly not censured, for failing to have recognized an alleged injunction (by way of comity) since the trial court was not properly notified of the federal injunction until after it had rendered its final decree. We are of the opinion that the parties herein should not have been permitted to experiment with the court, and that the trial court acted properly in refusing to recognize (by way of comity) the information that an injunction had been against some of the parties in the Federal Court of Oklahoma.

II

PLEA IN BAR.

[9] It is contended on appeal by the appellee Hyde in a proper plea in bar filed and argued separately, that Mississippi Code Annotated section 1347 (1956) is applicable to the facts in this case with reference to the injunction proceedings obtained during the progress of this case and effectively operates to release all errors in the judgment of the Chancery Court and is in effect a waiver of appellant's right of appeal.

The plea in bar was passed by order of this Court for determination upon final study of this case, and after a

study of the record as a whole, we have reached the conclusion that Mississippi Code Annotated section 1347 (1956) is not applicable under the pleadings and facts developed in this case. Moreover, the facts and proceedings involved herein are of such nature, and so unique, as to require a study and determination of the real issues involved. The plea in bar must therefore be overruled.

III

ISSUES OF FACT

We are now brought to the main issues presented by this appeal. That is to say, whether or not the appellant violated its contractual obligation which resulted in damages to the other contracting party, the appellee, and if so, whether or not the alleged damages were properly shown.

The contract between Hyde Construction Company, a Mississippi corporation, and C. S. Johnson, contained the following:

> "The terms of this contract are as follows:
>
> "(6) The C. S. Johnson Company guarantees the plant and cooling system to operate to the satisfaction of the buyer and to produce a minimum of two hundred cubic yards of specification concrete per hour.
>
> * * * * * *
>
> "It is proposed to cool the aggregates, including sand and the mixed water by means of a vacuum cooling process. The plant is to provide enough cooling so that two hundred cubic yards of concrete per hour can be provided continuously under assumed temperature conditions herein enumerated. The concrete to have a temperature of 47 degrees out of the mixer.
>
> * * * * * *

"The equipment furnished by The C. S. Johnson Company is as follows:

"Item 21 N

Initial installation supervision.

* * * * * *

"The C. S. Johnson Company will have a man follow the job until it is operating satisfactorily."

The contract also contained the provision for delivery of the cooling plant, as follows:

"(4) Delivery. After final approval of this proposed contract by our executive, we estimate shipment in approximately 100 working days from our receipt of your written acceptance of drawings, all permits required by law and other information necessary to proceed with the work."

Hyde offered testimony to show that the contract was finally executed on February 13, 1960; that the one hundred working days allowed by the contract for delivery of the plant expired on or about July 1, 1960. Hyde had scheduled August 15, 1960, when it was expected the concrete pouring would begin. Testimony shows that although Mr. George Holcomb was sent to the Keystone Dam site on the 16-20th of May 1960, as a representative of Koehring in an effort to comply with its contract to design aggregate tanks, however, a part of this tank did not arrive until September 12, 1960. The plant was not put into operation until October 15, 1960. The appellant Koehring offered evidence to show that the plans for the foundation were not submitted to them in time to permit the fabrication of the plant by the date originally scheduled. Moreover, appellant claims that the fact that the part arrived as late as October did not delay the erection

of the plant because (1) the ironworkers who were engaged in building the plant went on strike and refused to build it; (2) the plant was erected by carpenters; (3) these workers had more parts available at all times on the job site than they could erect within the scheduled time. Finally, it is alleged there was actually no time lost in building the dam, since it was completed within the time allowed.

[10] We are of the opinion, however, that the record reveals sufficient evidence, actual and circumstantial, from which the chancellor could have concluded that the cooling plant was not delivered to the appellee Hyde within the time required by the terms of the contract and that Hyde was damaged financially as a result of this delay.

IV

Appellee Hyde offered evidence to show that the appellant Koehring violated its guaranty to furnish a cooling plant that would operate satisfactorily; that neither Hyde, the corporation, nor R. W. Hyde, Jr., its President, nor any of the officers or employees of Hyde knew anything about the operation of a cooling plant, and relied entirely upon the reputation, ability and contractual obligation of Koehring to manufacture, deliver and supervise the erection of a cooling plant capable of cooling the aggregate ingredients used in the making of concrete for the Keystone Dam project. The testimony clearly establishes that the officers and agents of appellant Koehring fully understood why the Hyde Construction Company required it to guarantee the satisfactory operation of the cooling plant. The testimony also shows that the cooling plant did not operate satisfactorily until a great many changes and additions were made to the plant, particu-

larly the addition of a third boiler and the installation of additional primers for the three aggregate tanks, although it is admitted that there were a few times when the plant operated properly for a few hours. Testimony introduced by both parties established the fact that Koehring had never manufactured the type of cooling plant it guaranteed to operate satisfactorily in the instant case. Moreover, the agent sent to supervise the installation of the plant, had no previous knowledge or experience in erecting a vacuum cooling plant. It also appeared that there were known methods of reducing the temperature and wetting the aggregate before it was conveyed to the cooling tank, and which were not made known to the Hyde Construction Company by Koehring until long after the cooling plant had failed to operate to the satisfaction of either Koehring, the manufacturer, or Hyde, the contractor. Koehring, while not admitting that the plant failed to operate properly, contended that the many "breakdowns" and "slowdowns" and periods when the plant was inoperative were brought about by other factors, among which were: the operating personnel were inexperienced and inefficient, the water caused the boilers to fail and it was Hyde's duty to furnish proper water, the aggregate was out of specification, the aggregate stockpile was not promptly replenished, and the concrete forms for holding the concrete were not constructed at the proper time, so that the plant was required to remain inoperative for a long period of time. It also offered evidence to show that the cranes used to lift the cement buckets from the truck were often out of use because of "breakdowns"; that there were not enough "open spaces" on the dam to permit the continuouis operation of the plant; and that Hyde did not have sufficient trucks to promptly convey the cement from the plant to the "hole" or monolith where the concrete was actually poured.

We have reached the conclusion on this point, however, that all of the foregoing facts and other evidence detailed and enumerated in this voluminous record were issues of fact for the determination of the trial court on the question of whether or not the manufacturer failed to carry into effect its "guarantee" expressed in the contract between the parties. The trial judge was of the opinion that: "The cooling system of the plant never, at any time prior to the latter part of July, 1961, was satisfactory to the complainant, and during this time the defendant was making changes, additions and substitutions of parts and equipment. The defendant never at any time considered its part of the contract fully executed."

[11] We are unable to say that the chancellor was manifestly in error in holding that the appellant failed to carry into effect its contractual guarantee, and must therefore affirm the decree on his finding of fact.

V

ISSUE OF DAMAGES

The method used in determining the amount of damage in this case has given this Court more trouble than the issue of fact previously outlined, because some of the testimony on damages offered by both parties bordered upon guesswork and uncertainty.

Appellee Hyde offered proof to show that because of the failure of appellant Koehring to deliver the plant in the time required by the terms of the contract, Hyde was required to expend $11,859.26 overtime expense in erecting the plant. The proof of this item was a matter of bookkeeping and was relatively simple. On the other hand, the proof of the loss of production caused by the failure of the plant to perform as "guaranteed" was a problem of no mean consequence. The complainant Hyde,

in an effort to meet the required burden of proof of damages, offered the following method. Hyde divided the operation of the construction of the Keystone Dam into four parts. It then took two periods of time during the erection of the Keystone Dam project, and offered proof to show these periods were comparable in length of time, similar in activity, effort and handicap. It then offered evidence to show that after the plant had been properly erected by Koehring, it produced 15,500 cubic yards of concrete per week, whereas prior to the modification of the plant, it produced approximately 9,900 cubic yards of concrete per week. This was a loss of production of approximately 5,600 cubic yards of concrete per week for a period of nineteen weeks, or a total of 106,400 cubic yards of concrete. It then calculated that 9,000 over the common denominator 15,500 shows the loss of 36% in production. Hyde offered proof that its fixed expenses (such as overhead depreciation and indirect costs), amounted to $21,100.01 per week, and that a loss of 36% production for a period of nineteen weeks amounted to $136,728.06.

Hyde further offered proof to show that during the period when there was a 36% loss of production due to inability of the plant to produce the required concrete, it was necessary for Hyde to expend $273,865.19 as labor costs to mix, haul and pour the concrete, and that a loss of 36% in production resulted in the loss of $98,588.23; that when this figure has been multiplied by 1.12 (payroll tax and insurance) there was a total loss of $110,318.82 for labor. The 36% loss of production was thus used to calculate a monetary figure to show damages suffered by Hyde on the separate items of labor and expenses.

In reply to this method of making proof of damage, the Koehring Company offered to show that the periods

of time selected by Hyde to show the "unsatisfactory" and "satisfactory" operations of the plant were not comparable, because (1) the personnel in charge of operation of the plant had changed in the two periods; (2) new roads had been built, facilitating the unloading of the cement; (3) new trucks, cement buckets and other equipment, including cement pouring forms, had been purchased in addition to the equipment used during the allegedly "unsatisfactory" period; and (4) more places and spaces were provided for the reception of the concrete in the spillway, and during the "unsatisfactory" period, certain "slowdowns" were caused by the weather and an unexpected fault discovered in the base of the dam. Moreover, it is said, that the 36% loss of production figure did not take into account additional costs of material and labor expended during the "satisfactory" period. Testimony was also offered to show that the assumed 36% calculation of loss does not conform to generally accepted accounting practices, because the fraction used has an erroneous denominator of 15,500; that this calculation is based on the assumption that full capacity was attained in the use of the cooling plant during the "unsatisfactory period" from March 1961 to July 15, 1961, as well as the "satisfactory period" from July 16, 1961 to December 1, 1961. Moreover, the 36% is said to be based upon the entire cost of the construction, rather than the cost of cement manufacturing alone.

Appellee offered evidence to show additional damages in that Hyde was required to pay $88,202.92 in addition to the original cost of the cooling plant for labor and modifications, and additional equipment, including a third boiler which was necessary and essential and required equipment as a part of the plant before it would operate "satisfactorily." The chancellor was of the opinion that this additional payment should be recovered as damages to Hyde. We agree that this item was clearly shown by the testimony.

We are also of the opinion that the trial court had ample evidence on which to base the determination that the two periods of time were comparable and that a production loss of 36% was fairly shown by the evidence.

[12] Although the method used in obtaining the measure of damages is not entirely without fault, it may be said, as a general rule, that a party who has broken his contract will not be permitted to escape liability because of the lack of a perfect measure of damages caused by his breach. Therefore, a reasonable basis for computation and the best evidence which is obtainable under the circumstances of the case, and which will enable the trier to arrive at a fair approximate estimate of loss is sufficient proof. We are of the opinion that the method used in determining the measurement of damages for the breach of the contract in this case is fair, and this Court will not set aside the judgment obtained for the breach of the contract, although it may be said the method used here is not considered perfect. Nevertheless, except as to one item, we are of the opinion that the proof of damages was sufficient to sustain the judgment. See Billups Petroleum Co. v. Hardin's Bakeries Corp., 217 Miss. 24, 63 So.2d 543, 64 So.2d 764 (1953); Montgomery Ward & Co. v. Hutchinson, 173 Miss. 701, 159 So. 862 (1935); Shell Petroleum Corp. v. Yandell, 172 Miss. 55, 158 So. 787 (1935); Miss. Power & Light Co. v. Pitts, 181 Miss. 344, 179 So. 363 (1938); Hawkins Hdw. Co. v. Crews, 176 Miss. 434, 169 So. 767 (1936); United Press Ass'ns v. McComb Broadcasting Co., 201 Miss. 68, 28 So.2d 575, 30 So.2d 511 (1947); Vicksburg, Meridian R. R. v. Ragsdale, 46 Miss. 458 (1872).

We cannot approve one item of damage allowed by the chancellor against the appellant because we are of the opinion that the court was manifestly wrong in allowing damages for "winter protection." Appellee Hyde offered tes-

timony to show that it had been damaged in the sum of $51,733.71 because—it is said—Hyde was required to make extra expenditure for the winter protection of 138,864 cubic yards of concrete during the period from November 1, 1961 through March 1, 1962. We have reached the conclusion from all the testimony introduced on this item of damage that Hyde would not have completed its pouring of concrete before the Spring of 1962 in any event. Hyde would have necessarily been required to have furnished winter protection during the period for which this claim is made in some quantity of cubic yards of concrete poured. Moreover, the proof as to how much concrete would have been poured, and how much additional cubic yards of concrete—if any—would have required winter protection during this period is speculative. It is unsafe to base a judgment on conjecture. Berry v. Brunt, 172 So.2d 398 (Miss. 1965). The item of winter protection and the interest thereon should not have been allowed, and will be disallowed in the judgment of this Court.

VI

QUESTIONS OF LAW

Since we have held in the outset, in this opinion, that the State Chancery Court had concurrent jurisdiction with the Federal Court to try and determine the issues presented in the suit filed in that court, and since we are of the opinion that the suit in Chancery was *in personam* and not *in res*, the court properly proceeded to try the cause and reach a judgment. We are now confronted with the alleged errors of law presented for our consideration on appeal.

[13] It is argued that there was no breach of the contract by Koehring as a matter of law because there was no time for performance fixed in the contract, notice and

demand was necessary before Koehring could be held liable, and no notice was given to Koehring.

Appellant has cited several authorities from other jurisdictions on this proposition, including 17 Am.Jur.2d, Contracts, section 356 (1964), in support of its contention. An examination of these authorities, however, has convinced us that they are not applicable to this case, not only because the contract required Koehring to supervise the erection of the cooling plant but because appellant's agent sent to aid appellee kept appellant informed of the malfunction of the cooling plant day by day, as the work progressed. The evidence shows that appellant knew about the malfunction of the plant, and was in a constant state of activity in an effort to remedy the defects.

[14] It is next contended that the contract did not fix a time of performance when the cooling plant would operate "to the satisfaction of the buyer", and that the plant did finally operate satisfactorily, therefore there was no breach of the contract. We are also of the opinion that this rule is not applicable in the present case, because the warranty, (or "guaranty", as it is called in the contract,) like any other warranty implied or written, took effect at the time of the consummation of the contract, (46 Am.Jur., Sales, section 300, 1943). At the time the contract in this case was entered into, it was obviously intended there would be a period during which Koehring would supervise the installation of the equipment. It was intended that the plant should operate after its erection in conjunction with the operation of the "batch plant," for the purpose of pouring concrete. This it never did until it was modified.

[15] It is seriously contended that the provision in the contract, whereby Hyde was to pay 25% of the list price when the plant was operating "satisfactorily", and the fact that Hyde made payment pursuant thereto, operated as a

release of all claims for damages for an alleged breach of the contract. We are not intrigued with this argument because the testimony shows conclusively that the Hyde Corporation, and R. W. Hyde, individually, made continuous efforts to get Koehring to remedy the defects in the cooling plant. Every experiment suggested by Koehring was promptly followed, even the expensive suggestion of modification of the plant. Moreover, the appellant Koehring continued its efforts to remedy the defect in the cooling plant after the notes were given. The argument that Hyde waived any breach of the contract requiring the cooling plant to operate satisfactorily, based upon the fact that Hyde gave notes for the purchase price of the equipment after he had knowledge of the defects of the plant purchased and is thus estopped to claim damages for the breach of the warrant, is not well-taken. Appellant has cited the following cases as authority for this proposition: Anderson v. First Securities Co., 185 Miss. 500, 188 So. 548 (1939); Alig v. Lackey, 114 Miss. 392, 75 So. 139 (1917); Colt v. Kelly, 142 Miss. 617, 107 So. 757 (1926); Brewer v. Automobile Sales Co., 147 Miss. 603, 111 So. 578 (1927); Cherokee Mills v. Conner, 164 Miss. 704, 145 So. 735 (1933); Memphis Automatic Music Co. v. Chadwick, 164 Miss. 635, 146 So. 137 (1933).

These cases state the rule that the execution of a new contract or the promise to pay the original notes in consideration of the extension of time to pay the purchase price—after full knowledge of defects in the article purchased—operates to waive a defense to an action for the purchase price on the ground of breach of warranty. It may be pointed out that the case at bar is not a *defense* to the payment of notes based upon breach of a prior warranty known at the time of the execution of the notes (or renewal) for the purchase price of the articles sold, but the instant action is a suit for damages for the breach of a

contract for failure to carry into effect the "guarantee" set out in the contract. The article purchased under the contract here involved is not such as could be returned to the seller, the contract rescinded and another obtained or purchased upon the open market. The contract in the case at bar involves the purchase of machinery, a plant designed to do a particular job. The plant was massive in design and the installation alone was a stupendous undertaking. The purchse price and installation costs amounted to more than a million dollars. It was designed to operate in conjunction with a concrete "batch plant", and after having been erected, time to pour concrete became a moving factor. The purchaser's purpose in buying the plant was to pour concrete in the adjacent Keystone Dam. This was known to the seller. Hyde had no alternative or opportunity to reject the cooling plant. The work had to proceed and it was necessary to do everything possible to immediately get production out of the cooling plant. Hyde made arrangements to get an ice plant but appellant made modification to its cooling plant, and Hyde cancelled the order for the ice plant. Both contracting parties continued to do everything possible to make the plant produce. Moreover, the contract required the seller, Koehring, not only to furnish "the initial installation supervision", but to have a man follow the job until it was operating "satisfactorily." The obligation to render defects in the operation of the plant was therefore a continuing obligation which Koehring recognized and performed long after the buyer Hyde had given the notes, now claimed to be a waiver of the "guarantee" set out in the contract. We are of the opinion that the payment of the purchase price, or the giving of the notes for the purchase price of machinery designed for a particular job under the circumstances, as shown by the testimony in this case, is not a waiver of the warranty clause in the contract, nor is the purchaser estopped to

bring an action for damages growing out of the breach of the contract.

It is pointed out by the textwriter in 46 Am.Jur., Sales, section 730 (1943), at page 854, that:

> "It has been held that the fact that the buyer pays the price after notice of defects in the goods constituting a breach of the seller's warranty does not constitute a waiver of the breach so as to preclude him from maintaining an action therefor. * * * Whether giving a note is a waiver is at most a question of fact. Likewise, where the article warranted was purchased on credit, the giving of renewal notes for the price is not necessarily a waiver of the buyer's claim for damages. There would seem to be no ground for a claim that the buyer has waived a breach of warranty of the efficiency and quality of machinery sold by its use of the machinery during continued attempts of the seller to remedy defects therein."

See also Dancey v. Sugg, 46 Miss. 606 (1872); Stillwell Bierce & Smith Vaile Co. v. Biloxi Canning Co., 78 Miss. 779, 29 So. 513 (1901); 77 C.J.S. Sales § 347a, p. 1250 (1952); 77 C.J.S. Sales § 366c, p. 1287 (1952); Carver Gin and Machinery Co. v. Gaddy, 62 Miss. 201 (1884); Bowers v. Southern Automatic Music Co., 114 Miss. 25, 74 So. 774 (1917); Christian & Brough Co. v. Goodman & Garrett, 132 Miss. 786, 96 So. 692 (1923); Morrow v. Barron Motor Co., 229 Miss. 51, 90 So.2d 20 (1956).

In conclusion, appellant argues that the evidence in this case preponderates in its favor; that the delays "shutdowns" and inactivity of the concrete pouring operation at Keystone Dam were not the result of defects in the cooling plant but were brought about by many other causes, including the fact that Hyde was required to pour additional concrete to fill a land "fault" discovered at the base of the dam. Appellant insists that the court overlooked the testi-

mony of a similar claim filed with the United States Corps of Engineers for the same damages sought in the instant cause of action, based upon a different reason. We feel that we have already answered this argument under Section IV, but again we point out that the various issues of fact have been settled and determined by the opinion of the Chancellor in the decree of the Chancery Court, and with the exception of the amount allowed for winter protection, we are unable to say the Chancery Court was manifestly wrong in its determination of the facts.

[16] Finally, we are of the opinion that the decree of the Chancery Court awarding damages to Hyde Construction Company against Koehring Company, Inc., should be affirmed, but that the sum of $51,733.71 allowed as extra costs for winter protection, and the sum of $3,155.76 allowed as interest, totaling $54,889.47, should be deducted from the total award shown in the decree of the Chancery Court, against the total sum of $464,450.08, leaving a balance of $409,560.61. Interest of six percent on the balance from April 1, 1963, (the final interest date shown in the decree of the Chancery Court) until the date of the order of this Court is hereby allowed.

The decree of the Chancery Court is hereby affirmed in part (the sum of $409,560.61) and reversed in part, (winter protection and interest, $54,889.47), and judgment is hereby rendered against Koehring Company in favor of Hyde Construction Company in the sum of $409,560.61, plus six percent interest thereon, from and after April 1, 1963.

Affirmed in part, and reversed in part, and judgment rendered.

All Justices concur.

APPENDIX D

Judgment of Supreme Court of Mississippi, Dated February 7, 1966.

In the Supreme Court of Mississippi

Monday, February 7, 1966 Court Sitting:

Koehring Company vs. Hyde Construction Company, Inc.; 43,572.

This cause this day came on to be heard on the motion of the appellee, Hyde Construction Company, Inc., to correct the judgment heretofore entered in this cause and this Court having sufficiently examined and considered the same and being of the opinion that the same should be sustained in part doth order and adjudge that said motion be and the same is hereby sustained and the following entered as the final judgment in this cause, to-wit: This cause having been submitted at a former Term of this Court on the record herein from the Chancery Court of Hinds County, First District, and this Court having sufficiently examined and considered the same and being of the opinion that there is partial error therein doth order and adjudge and decree that the decree of said Chancery Court rendered in this cause on the 8th day of April 1964—be and the same is hereby affirmed in part, and reversed in part and this Court now here proceeding to render and enter the judgment that should have been entered in the Court below doth order and adjudge and decree that the appellee, Hyde Construction Company, Inc. do have and recover of and from the appellant, Koehring Company, jointly with Fidelity & Deposit Company of Maryland, surety on the supersedeas bond, the sum of $406,396.89 with interest at the rate of 6 per centum per annum from and after April 8, 1964 until paid, and all of the costs in the Court below; the costs on appeal are taxed one-half against the appellant and one-half against the appellee, for which and all of which let proper process issue.

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APPENDIX E

Motion of Hyde Construction Company Filed in the Oklahoma District Court, Styled "Amended and Supplemental Motion to Dissolve Injunction and Vacate Order of Civil Contempt and to Dismiss Cause". (Without Exhibits)

Amended And Supplemental Motion To Dissolve Injunction And Vacate Order Of Civil Contempt And To Dismiss Cause
[5911]

Now comes Hyde Construction Company, Inc., and without waiver of its objections to jurisdiction and venue or of its original or its amended and supplemental motion to transfer the case back to the Court in which it originated, respectfully moves the Court to dissolve the injunction imposed by this Court's order of September 1, 1964, against proceedings of the State Courts of Mississippi for collection of the Judgment against Koehring Company in Cause No. 60,068 in the Chancery Court of the First Judicial District of Hinds County, Mississippi, and in Cause No. 43,572 in the Supreme Court of Mississippi and to vacate its order in civil contempt, and to dismiss this cause without prejudice, and for grounds would show:

1. Since the injunction against collection was issued, the Decree of the Chancery Court of Hinds County, from which the Koehring Company appealed, has been affirmed (as modified) and a final judgment has been entered by the Supreme Court of the State of Mississippi.

2. The Supreme Court of Mississippi, on the appeal of the Koehring Company, has adjudicated finally: (1) That the Chancery Court acted only on purely in personam aspects of the case; and (2) That the State Courts had jurisdiction of the parties and subject matter; and (3) That the State Courts had the right and duty to pro-

ceed and to enter the final judgment in personam on the merits of the case.

3. The judgment of the Supreme Court of Mississippi is entitled to full faith and credit in the Courts of the United States under 28 U.S.C. 1738 and under the Constitution of the United States (Art. IV, Section 1), and under the law of the land.

4. The State judgment is final and fully enforceable and is res judicata under the laws of the State of Mississippi, and is entitled to be allowed the same effect in all other Courts and jurisdictions under the full faith and credit doctrine.

5. The injunction against collection is an injunction to stay proceedings of a State Court contrary to 28 U.S.C. 2283.

6. The State Chancery Court dealt only with the purely in personam aspects of the controversy between the litigants. The order to stop the proceedings on the motion of the Koehring Company was erroneous, if not wholly void, as to such in personam aspects of the proceedings, and cannot support sanctions in favor of the moving litigant in civil contempt.

7. This cause has been tried on its merits at great expense. The resulting Judgment has become a property right vested in Hyde Construction Company, Inc. and its assigns. For these and other reasons apparent, the withholding of full faith and credit from the judgment in Movant's favor on the merits would be to deprive it of its property without due process of law, contrary to equity and law and to the Constitution of the United States.

8. The case was fully and fairly tried in the State Courts. The Koehring Company did not withdraw from the State Court proceedings in reliance upon the restraining order of this Court, and did not elect to remove the

case to the Federal Court, but invoked the jurisdiction of the State Courts and fully participated in those proceedings. Wherefore, the Koehring Company is now estopped from asserting, by collateral attack, any alleged rights contrary to or at variance with the adjudication and judgment resulting from such proceedings.

9. This Court was without jurisdiction because the case had been dismissed by notice under Rule 41 of the Federal Rules of Civil Procedure, which notice was recognized as effecting a dismissal by the order of the United States District Court for the Southern District of Mississippi prior to the transfer order of Judge Brown of the Fifth Circuit.

This motion is based upon the record now on file and in further support hereof, Movant attaches hereto and incorporates herein, by reference, the following exhibits: (A) The Complaint in Cause No. 60,068; (B) the Answer of Koehring Company in Cause No. 60,068; (C) the Final Decree of the Court in Cause No. 60,068; (D) the Notice of Appeal to the Supreme Court of Mississippi and Appeal Bond in Cause No. 60,068; (E) the Assignments of Error on Appeal; (F) the Motion of Appellee to Dismiss the Appeal; (G) the initial Opinion of the Supreme Court and Judgment thereof; (H) the Suggestions of Error by Appellant; (I) the Motion of new counsel for leave to file a brief on Suggestion of Error; (J) the Motion of Appellee to Correct Judgment; (K) the Opinion of the Supreme Court of Mississippi overruling Suggestions of Error; (L) the Opinion of Supreme Court of Mississippi on Motion to Correct Judgment; and (M) the Final Judgment of Supreme Court of Mississippi, dated February 7, 1966: all authenticated according to the Acts of Congress.

Specifically in support of Item No. 8 above, and generally, to the extent applicable, in support of all other items

hereof, Movant files herewith and incorporates herein by reference a complete transcript of the pleadings, orders, findings, opinions, testimony, evidence, exhibits and proceedings filed and developed in the Chancery Court of the First Judicial District of Hinds County, Mississippi, in Cause No. 60,068, and in the Supreme Court of Mississippi on appeal in Cause No. 43,572, all authenticated according to the Acts of Congress, except only that certain bulky exhibits, movie films and physical objects sent to and now on file in the Supreme Court of Mississippi in original form, as more particularly identified by the list included in the Certificate of the Clerk of the Supreme Court and on the copy of the Motion hereinafter referred to, are not physically filed contemporaneously with the filing of this Motion, but are incorporated herein by reference, subject to later physical filing when the same become available to Movant.

As to said omitted exhibits in original form, a Motion for leave to withdraw said exhibits has been filed with the Supreme Court of Mississippi and served on counsel for the Koehring Company, copy of which said Motion is hereto attached, and Movant represents that unless counsel for the Koehring Company object or the Court refuses leave to withdraw said original exhibits, the same will be withdrawn by Movant and filed with the Clerk in this cause as a part of Exhibit N hereto, all to the end that this Court may be fully apprised of all matters, facts and things which were before the Courts in said Chancery Cause No. 60,068 and Supreme Court Cause No. 43,572. Said transcript filed contemporaneously herewith and the exhibits hereafter to be filed will be collectively referred to as Exhibit N to this Motion.

Respectfully submitted,
Charles Clark
Davis H. Sanders
Attorneys for Plaintiff

Filed March 21, 1966.

APPENDIX F

Opinion of the Court of Appeals for the Tenth Circuit on Hyde's Appeal from the Order Denying the Amended and Supplemental Motion.

UNITED STATES COURT OF APPEALS*
TENTH CIRCUIT

No. 8717—JANUARY TERM, 1968

HYDE CONSTRUCTION COMPANY, INC.,
Appellant,
v.
KOEHRING COMPANY,
Appellee.

Appeal from the United States District Court for the Northern District of Oklahoma

Before BREITENSTEIN, HILL and SETH, Circuit Judges.

BREITENSTEIN, Circuit Judge.

This bitterly contested litigation has cut a tortuous path through federal and state courts since its inception in 1961. It is now before us on an appeal from a denial by the United States District Court for the Northern District of Oklahoma of a motion by appellant Hyde Construction Company to dissolve an injunction which, among other things, restrains Hyde from enforcing a judgment obtained in a Mississippi state court and sustained by the Supreme Court of that state. The judgment awarded Hyde damages for breach of contract by appellee Koehring Company. Consideration of the issues requires an understanding of the appalling background.

Hyde was the prime contractor for the construction of a spillway at the federal Keystone Dam project in Okla-

*Reported in 338 F.2d 501.

homa. Hyde contracted with Koehring for the design and installation by Koehring of a concrete cooling and mixing plant for use by Hyde on the project. Difficulties arose in the performance of the contract. On August 30, 1961, Hyde sued Koehring in the United States District Court for the Southern District of Mississippi to recover damages for the breach of the concrete plant contract. Jurisdiction was based on diversity. On the next day, Koehring sued Hyde in the United States District Court for the Northern District of Oklahoma to recover the unpaid balance of the cost of the plant. This was paid and the Oklahoma suit was dismissed.

On September 21, 1961, in the Mississippi federal court, Koehring moved to dismiss for lack of jurisdiction or, in the alternative, for change of venue to the United States District Court for the Northern District of Oklahoma. On September 27, 1961, Hyde brought suit in the Chancery Court, Hinds County, Mississippi, against Koehring on the identical cause of action asserted in the Mississippi federal suit. Koehring did not seek to remove this action to the federal court. On June 15, 1962, the Mississippi federal court denied Koehring's motions to dismiss and for change of venue. These rulings were certified for an interlocutory appeal under 28 U.S.C. § 1292(b).

The United States Court of Appeals for the Fifth Circuit, on September 19, 1963, held that the case should be transferred to the Northern District of Oklahoma and remanded it to the Mississippi federal court for that purpose. See Koehring Company v. Hyde Construction Company, 5 Cir., 324 F. 2d 295. Hyde filed a petition for rehearing which was denied on February 5, 1964, and Koehring presented a motion to stay the proceedings in the state court which was denied on January 27.

On February 16, 1964, Hyde filed in the Mississippi federal court a motion to deny the transfer on the ground

of changed circumstances. Hyde also gave notice that, in the event the foregoing motion was denied, it voluntarily dismissed the federal case under Rule 41(a)(1), F.R.Civ.P. Koehring's lawyers mailed to Hyde's lawyers an answer in the federal case on February 20, 1964. Apparently, this was also mailed to the Oklahoma federal court. It was actually not filed until March 11, 1964. On February 24, the Mississippi federal court overruled Hyde's motion to reconsider venue and entered an order for dismissal without prejudice.

The state court trial was set for March 9, 1964. On March 6, 1964, Koehring obtained from the Court of Appeals for the Fifth Circuit a temporary restraining order prohibiting Hyde from further action in the state court pending determination of an application for mandamus filed by Koehring on March 4. The state court then rescheduled the trial to begin at two o'clock on March 10. On that day the Court of Appeals for the Fifth Circuit in an unpublished opinion vacated the Mississippi federal court's order to dismiss the action and ordered a self-executing instanter transfer to the Northern District of Oklahoma. It also vacated its temporary ex parte restraining order. Meanwhile, the state court trial had been reset for March 11, 1964, at two o'clock P.M. On March 10, Koehring presented to the state court a motion to abate and stay the state proceedings pending the outcome of the trial in federal court. On the same day, the state court entered an order to proceed with the trial.

On the morning of March 11, Koehring presented to the Oklahoma federal court a certified copy of the order for instanter transfer and a motion for an injunction and for an ex parte restraining order. A temporary restraining order was issued before two o'clock P.M. ordering Hyde and its attorneys not to proceed with the state court trial. Telegraphic notice of this order was given to Hyde's

attorneys, and the state court, before which the trial was proceeding, was told of the order. The trial continued and culminated on April 7, 1964, in a judgment in favor of Hyde and against Koehring in the amount of $464,450.08.

On March 14, the Oklahoma federal court issued an order for the arrest of Vardaman Dunn, an attorney for Hyde, on charges of criminal contempt because of his disobedience of the restraining order. On the same day, the Mississippi state court made an order restraining the United States Marshal from arresting Dunn. Dunn was taken into custody on March 16 and was released on a writ of habeas corpus issued by the United States District Court for the Southern District of Mississippi. On April 8, that court ordered the release of Dunn on the ground that the March 11 temporary restraining order of the Oklahoma federal court was invalid. See Dunn v. Stewart, D.C.S.D. Miss., 235 F.Supp. 955. This decision was reversed by the Court of Appeals for the Fifth Circuit on the ground that the invalidity of the restraining order could not be used to sustain the petition for habeas corpus. See Stewart v. Dunn, 5 Cir., 363 F.2d 591. On April 21, the Mississippi state court enjoined Koehring and its attorneys from proceeding with the case in the Oklahoma federal court.

On September 1, 1964, the Oklahoma federal court issued an order enjoining Hyde from collecting the Mississippi judgment but permitting Hyde to participate in the appeal to the Mississippi Supreme Court. It also required Hyde and Dunn to reimburse Koehring in the sum of $9,009.08 for damages resulting from the civil contempt committed in violating the March 11 restraining order. Hyde appealed this order to the Court of Appeals for the Tenth Circuit which held that the injunction and contempt proceedings were invalid because the order of instanter transfer was invalid and the Oklahoma federal court

had acted before the transfer to it of jurisdiction over the parties and the subject matter. See Hyde Construction Company v. Koehring Company, 10 Cir., 348 F.2d 643. This decision of the Tenth Circuit was reversed by the United States Supreme Court on January 17, 1966, which held that the Oklahoma federal court had jurisdiction under the instanter transfer. See Koehring Company v. Hyde Construction Company, 382 U.S. 362, rehearing denied 383 U.S. 939.

On October 4, 1965, the Supreme Court of Mississippi denied the appeal of Koehring, held that the Chancery Court had jurisdiction, and reduced the judgment by about $50,000. See Koehring Company v. Hyde Construction Company, (Miss.), 178 So.2d 838 and 182 So.2d 580. Koehring did not seek review by the United States Supreme Court of this decision. The Mississippi Supreme Court also held that the order of the Chancery Court enjoining Koehring from proceedings in the Oklahoma federal court was invalid. See Koehring Company v. Hyde Construction Company, (Miss.), 178 So.2d 857.

On March 21, 1966, Hyde filed a motion in the Oklahoma federal court to dissolve the injunction, to vacate the civil contempt order, and to dismiss the case. It asserted, among other things, that the Mississippi judgment was final and barred further proceedings in the Oklahoma federal court under the principle of res judicata. These motions were denied April 18, 1966. Hyde then appealed to the Court of Appeals for the Tenth Circuit from the denial of the motion to dissolve. This is the case now before us. Koehring moved for the dismissal of the appeal and we denied the motion on July 27, 1966, by an unpublished opinion. Koehring sought review by certiorari which the Supreme Court denied on November 14, 1966.

See Koehring Company v. Hyde Construction Company, 385 U.S. 949.

After a hearing without a jury, the Oklahoma federal court, on August 23, 1966, found Dunn guilty of criminal contempt because of his violation of the March 11, 1964, restraining order and imposed a 90-day sentence. The appeal of Dunn, our case No. 9142, is disposed of by an opinion filed contemporaneously with the opinion in this case.

We have jurisdiction of appeals from interlocutory orders of district courts refusing to dissolve or modify injunctions. See 28 U. S. C. § 1292(a)(1). This appeal is from an order of the district court refusing to dissolve or modify its September 1, 1964, injunction barring Hyde from collecting or enforcing the Mississippi judgment and requiring Hyde to pay damages for the civil contempt which it committed in breaching the March 11, 1964, restraining order.

We have difficulty with the September 1 orders of the district court. The court recognized the pending appeal in the Mississippi Supreme Court and permitted Hyde to participate therein. At the same time it enjoined Hyde from enforcing the state judgment. It said that the federal trial would proceed as if the Mississippi state case had not been tried and then added that it might take the state judgment into consideration when disposing of the federal case. These actions seem inconsistent to us. The effect is to permit two trials of the same issue—one in state court and one in federal court. Ordinarily, one trial of a controversy is enough.

Koehring argues that the issues raised by the motion to dissolve the injunction were finally and completely determined by the decision of the Supreme Court in Koehring

Company v. Hyde Construction Company, 382 U.S. 362. That case in the court of appeals presented questions as to the jurisdiction of the Oklahoma federal court and as to the validity of the injunction. The court of appeals held that the Fifth Circuit's order of instanter transfer was invalid and did not reach the other issues. The Supreme Court granted certiorari and reversed summarily. In so doing it summarized the action of the district court and recited the provision of the order that "the civil suit between the parties [be] retried — this time in Oklahoma and in federal court." The Court concluded that, in the special circumstances of the case, the Oklahoma federal court acquired jurisdiction on March 11 under the Fifth Circuit's instanter transfer and that "the Tenth Circuit erred in vacating the District Court's orders on the stated jurisdictional ground." The Court remanded the case to the Oklahoma federal court "for further proceedings consistent with this opinion, reserving to the parties the right to apply to that court to have the case transferred back to the Southern District of Mississippi because of changed conditions."

Koehring argues that the decision of the Supreme Court means that the federal injunction against the state trial was valid. We do not read the opinion of the Supreme Court to intend such effect. The validity of the injunction is not discussed in spite of the fact that it was attacked on grounds which raise serious questions bearing on the relationship of federal and state courts. The use in the opinion of the word "retried" has no significance to us because it appears in a recital of the provisions of the order of the Oklahoma federal court. The remand is for further proceedings consistent with the opinion but the opinion does no more than sustain the transfer jurisdiction. The remand recognizes the right of the parties to

seek a transfer back to the federal court in Mississippi. This is not consistent with any idea that the Supreme Court intended to order a trial on the merits in Oklahoma federal court.

Hyde filed in the Supreme Court a "Petition for Rehearing And Motion To Amend Order of Remand." Therein it pointed out that the court of appeals, because of its ruling on the jurisdictional point, had declined to consider the other issues presented by Hyde. Such questions included the effect of the voluntary dismissal under Rule 41(a)(1) and the validity of the restraining order and injunction under 28 U.S.C. § 2283. Hyde asked that the case be remanded to the court of appeals for the determination of these questions. The Supreme Court denied the petition for rehearing and the motion to amend the order of remand. See Koehring Company v. Hyde Construction Company, 383 U.S. 939. Koehring interprets this denial as decisive of the points raised. We see the situation differently. In the exercise of its discretionary powers, the Supreme Court chose to confine its decision to the narrow jurisdictional point and in so doing did not express an opinion on the merits of the injunction. This failure to express an opinion does not amount to a determination that the points raised were decided adversely to Hyde. The points are substantial — not frivolous. One relates to the effect of a conditional dismissal under Rule 41(a)(1) — a point on which no appellate authority appears to exist. The other relates to the propriety of the injunction under one of the exceptions to 28 U.S.C. § 2283. It seems improbable to us that the Court would dispose of the merits of a case in this sensitive area without full-fledged presentation and without discussion of pertinent decisions.[1]

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1. E.g. Princess Lida of Thurn and Taxis v. Thompson, 305 U.S. 456, 466, and Kline v. Burke Construction Company, 260 U.S. 226, 232-233.

Koehring also argues that the remand to the district court rather than to the court of appeals shows that the Supreme Court intended that the validity of the injunction was settled. We find no such intent. Although the remand could have been to the court of appeals for consideration of the questions other than jurisdiction, the fact that such remand was not made does not mean that those other issues were decided. In our opinion the Supreme Court did not foreclose Hyde from the assertion of the issues now raised.

Koehring next urges that on the return of the case to the district court Hyde may urge only new and unforeseen circumstances in a motion to dissolve the injunction.[2] This argument assumes that the points raised by Hyde have been foreclosed. We reject the assumption. Hyde is entitled to have its contentions heard in an appellate court. Additionally, there is a changed circumstance. The Mississippi state court in personam judgment has been sustained, with a reduction in damages, by the state supreme court after full submission and consideration of jurisdictional questions; and the judgment has become final because of the failure of Koehring to seek certiorari review.

These conclusions make necessary consideration of the attack by Hyde on the injunction. Hyde says that the Mississippi federal court action was dismissed voluntarily under Rule 41(a)(1) before the transfer to the Oklahoma federal court. After the Court of Appeals for the Fifth Circuit ordered the district court to transfer the case to the Northern District of Oklahoma, Hyde filed in the Mississippi federal court a motion in three parts. Part A

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2. See System Federation v. Wright, 364 U.S. 642, 647, (modification of a consent decree because of change in law), and United States v. Swift & Co., 286 U.S. 106, 114 (claim of changed facts).

sought the revocation of the transfer order because of changed circumstances. Part B was a notice of dismissal under Rule 41(a)(1). Part C said that if Hyde was mistaken under Parts A and B, then it requested a dismissal by the court. The court declined to revoke the transfer as requested under Part A, held that the notice of dismissal was good, and dismissed the action.

Rule 41(a)(1) provides for a dismissal without order of the court "by filing a notice of dismissal at any time before service by the adverse party of an answer * * *." Hyde said, in effect, to the Mississippi federal court that if the case was not kept there, the case was dismissed. Such a conditional notice of dismissal is not within the scope of Rule 41(a)(1). The purpose of that rule is to provide a means for terminating an action automatically by filing with the clerk a notice of dismissal. That notice closes the file; no order of the court is needed.[3] If the conditioning of notices of dismissal is allowed, the clerk of the court will be called upon to exercise a duty more than merely ministerial. Instead of simply closing the file of a case once the notice of dismissal is filed, the clerk will have to construe the condition and perhaps even become a fact-finder to determine when the condition is satisfied. This defeats the purpose of Rule 41(a)(1) to provide a quick, automatic means of ending an action.

In the instant case, Koehring had served an answer on Hyde before the condition was met. Rule 41(a)(1) is effective only until an answer is served by an adverse party. Hyde argues that a party cannot avoid the effect of a notice of dismissal without prejudice by answering after he has been notified that plaintiff intends to file a

3. American Cyanamid Co. v. McGhee, 5 Cir., 317 F. 2d 295, 297.

notice of dismissal. The cases cited for this point hold only that a defendant may not defeat Rule 41 (a)(1) in removal cases by winning the race to the courthouse to file an answer immediately after the removal transcript is filed, or by serving an answer if he has notice that the plaintiff wishes to dismiss as soon as the transcript is filed. That is a far cry from saying that the plaintiff may prevent the defendant from answering for so long as the plaintiff is seeking determination of preliminary procedural issues.

The fact that the court, rather than the clerk, made the order of dismissal does not change the situation. The court acted on the basis that the notice under Rule 41(a)(1) was valid. The Court of Appeals held directly to the contrary and said "the District Judge is hereby ordered to vacate the order or orders of dismissal entered on February 24, 1964 * * *."[4]

So far as we are concerned this action by the Fifth Circuit is the law of the case. We believe that it is correct and we accept it. In our opinion the attempted dis-

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4. In an unpublished opinion appearing in the record in this case, the Fifth Circuit said: "* * * the District Judge was of the opinion that, entirely consistent with our mandate, there being no answer yet filed, the Plaintiff Hyde had the unqualified right of dismissal or notice under F.R.Civ.P. 41 (a) (1). On the oral presentation Tuesday, March 10, 1964, this Court was informed that subsequent to the Plaintiff's alternative motions (Parts A and B) filed on February 15, 1964, the Defendant Koehring Company served its answer on counsel for Hyde, F.R.Civ.P. 5(a)(b), the formal filing thereof under Subparagraph (d) not having been physically accomplished pending entry of an order by the District Court transferring the case to Oklahoma. There being no substantial dispute about this fact, we are of the clear view that the plaintiff did not have the unqualified right to dismissal under F.R.Civ.P. 41(a)(1) and in view of our mandate, the District Court did not have the power or right to entertain a motion on terms or conditions. The Plaintiff's motion (Part B) did not have the effect of a 'filing [of] a notice of dismissal' as of the date it was filed since it was not then a notice of dismissal, but was conditioned on adverse determination of Part A of its motion."

missal did not oust either the Mississippi federal court or the Oklahoma federal court of jurisdiction.

The controlling argument on the validity of the injunction goes to the question of whether it is within one of the exceptions recognized in 28 U.S.C. § 2283. That statute forbids a federal court to enjoin state court proceedings except when expressly authorized by Congress "or where necessary in aid of jurisdiction, or to protect or effectuate its judgments." Koehring says that the injunction is necessary to protect the federal jurisdiction.

The rule is well established that a federal court may restrain proceedings in a state court when necessary to protect the federal court's jurisdiction over a res which is the subject of both the federal and state proceedings.[5] The rule is equally well established that if both federal and state actions are in personam, the actions may proceed simultaneously and the federal court may not enjoin the state proceeding.[6] The question, then, is whether we are dealing with cases in rem.

Both the federal and state actions seek damages for breach of contract. As such they are actions in personam. The claim of a res arises from the chancery attachment in each case of a creditor of Koehring as permitted by Mississippi law.[7] Under Mississippi law service on the attachment defendant "does not bring any fund into the pos-

5. See Donovan v. City of Dallas, 377 U.S. 408, 412; Toucey v. New York Life Insurance Co., 314 U. S. 118, 135; Penn General Casualty Co. v. Pennsylvania, 294 U.S. 189, 195; and Denver-Greeley Valley Water Users Association v. McNeil, 10 Cir., 131 F.2d 67, 70.

6. Penn General Casualty Co. v. Pennsylvania, 294 U.S. 189, 195; Kline v. Burke Construction Co., 260 U.S. 226, 230; Skelly Oil Co. v. Phillips Petroleum Co., 10 Cir., 174 F. 2d 89, 100, modified in non-pertinent part, 339 U.S. 667; and Guardian Life Insurance Co. v. Kortz, 10 Cir., 151 F. 2d 582, 585.

7. See Mississippi Code Annotated (1956) § 2729.

session, custody or control of the Court, no monies are paid into the registry of the Court, and no bond is required."[8] The only res is the debt owed Koehring in Mississippi. This was attached by Hyde as an aid to jurisdiction in both the federal and state courts. Koehring, for obvious reasons, does not now contest federal jurisdiction. Instead, it relies on the attached res to justify the injunction under the "in aid of its jurisdiction" exception in § 2283. Parenthetically, we observed that in the circumstances no such aid is required to sustain federal jurisdiction.

Once jurisdiction is obtained, the only function of the attached res is to afford a means of collecting whatever judgment might be secured. The courts have gone far in permitting simultaneous actions affecting a single res so long as the action taken on the res by one court will not conflict with actions by the other court.[9] Here the basis of each suit is an in personam claim for breach of contract. The attachment is an ancillary proceeding to aid in the collection of whatever judgment might be secured; it has nothing to do with the merits of either case. We have no question here of the enforcement of the state court judgment against the attached res. That judgment specifically dismissed the attachment defendant and does not affect any res within the control of the federal court. The Oklahoma federal court injunction goes beyond the protection of the res and restrains the state in personam proceedings. It is an unnecessary interference with a state court proceeding by the federal court, the very thing that § 2283 and the long-established rules of comity were designed to prevent. This conflict could easily have been prevented

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8. Koehring Company v. Hyde Construction Company, (Miss.) 178 So. 2d 838, 848, quoting Dunn v. Stewart, D.C.S.D. Miss., 235 F. Supp. 955, 966.

9. See United States v. Klein, 303 U.S. 276; General Baking Co. v. Harr, 300 U.S. 433; and Denver-Greeley Valley Water Users Association v. McNeil, 10 Cir., 131 F. 2d 67.

by enjoining only that part of the state court proceedings which affected the federal court's control of the attachment debtors.[10] The order of the court below restraining the entire state action was not necessary and cannot be sustained.

The situation is not changed by the fact that in both the federal and state proceedings Hyde sought, in addition to damages for breach of contract, a declaratory judgment and injunctive relief. The declaratory judgment provisions[11] create no statutory exception to § 2283. The decision in American Ins. Co. v. Lester, 4 Cir., 214 F.2d 578, is distinguishable. The primary scope of that case was to declare rights of a number of parties and avoid a multiplicity of lawsuits. Equitable considerations required the protection of federal jurisdiction. Here the primary aim is the determination of damages for breach of contract; and no equitable considerations require an injunction against the state proceedings. In our opinion the right to a federal injunction does not flow from the fact that the actions seek damages for breach of contract, a declaratory judgment, and an injunction.[12] Koehring makes no claim that the state proceedings were conducted, or the state judgment obtained, fraudulently or unconscionably. We conclude that the injunction was not within the § 2283 exception permitting a stay in aid of federal jurisdiction.

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10. In Penn General Casualty Co. v. Pennsylvania, 294 U.S. 189, 198, the Supreme Court said: "While it is often said that of two courts having concurrent jurisdiction *in rem*, that one first taking possesion acquires exclusive jurisdiction, * * * it is exclusive only so far as its exercise is necessary for the appropriate control and disposition of the property. The jurisdiction does not extend beyond the purpose for which it is allowed, to enable the court to exercise it appropriately and to avoid unseemly conflicts. * * * The other court does not thereby lose its power to make orders which do not conflict with the authority of the court having jurisdiction over the control and disposition of the property."

11. 28 U.S.C. §§ 2201 and 2202, and Rule 57, F.R.Civ.P.

12. See IA, Moore Federal Practice ¶ 0.220, p. 2604.

Koehring argues further that the stay was permissible to protect or effectuate the federal judgment of the Fifth Circuit ordering the transfer to the Northern District of Oklahoma. We have held that the protection-of-judgments exception in § 2283 was included within the 1948 revision of the Judicial Code to overcome the effect of the decision in Toucey v. New York Life Insurance Co., 314 U.S. 118, and "to give Federal Courts the power to enjoin the relitigation of cases and controversies which have been fully adjudicated in such courts."[13] It may be that in some situations the exception extends to interlocutory orders[14] but we have no reason here to recognize any such exception. The Fifth Circuit decided only where the federal case should be tried under the federal *forum non conveniens* law. The restraining order against proceeding in the Mississippi state court was expressly vacated by the Fifth Circuit. The Mississippi proceedings in no way conflict with the decision that the Northern District of Oklahoma is the more convenient federal forum. Our conclusion is that the Oklahoma federal injunction is not within any of the exceptions found in § 2283 and consequently is forbidden by that statute.

The basic thrust of Koehring's argument is that, regardless of whether the Oklahoma federal injunction was good or bad, it was issued and destroyed the efficacy of the state proceedings and state judgment for all purposes so far as the federal courts are concerned. No decisions of which we are aware support this novel concept. The in personam features of the controversy were thoroughly litigated in the state courts with full participation by Koehring. It voluntarily filed a general appearance in state

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13. Jackson v. Carter Oil Co., 10 Cir., 179 F. 2d 524, 526-527, cert. denied 340 U.S. 812.

14. See Sperry Rand Corporation v. Rothlein, 2 Cir., 288 F. 2d 245, 249.

court. It appealed the adverse judgment to the state supreme court and in that appeal litigated the right of the state court to proceed in the face of the injunction. The state supreme court carefully considered the issue and came to the conclusion that the state court had jurisdiction to proceed.[15] Koehring did not seek review of that decision in the Supreme Court of the United States; and the decision has become final. We have identity of parties —Koehring and Hyde—and identity of subject matter—jurisdiction of the Mississippi court to proceed. The principles of res judicata apply to questions of jurisdiction.[16]

Koehring seeks to carve out a new exception to the res judicata rule on the basis that the Mississippi proceedings in violation of the Oklahoma federal court order are contrary to the doctrine of federal sovereignty. We grant that the question of the validity of the plea of res judicata on the jurisdictional question now presented is for decision by the federal court.[17] We hold that, in the circumstances of this case, the plea is good. Such conclusion is the surrender of no federal authority. Federal law has long tolerated duplicating or overlapping proceedings in federal and state courts.[18] The dignity of the federal courts is adequately protected by the criminal contempt proceeding with which we are not concerned in this case. A holding that a state court is ousted of jurisdiction by an invalid order of a federal court would open a Pandora's box to resourceful litigants.

The March 11, 1964, temporary restraining order ended by its own time limitations and was followed by the

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15. See Koehring Company v. Hyde Construction Company, (Miss.), 178 So. 2d 838, 842-850.

16. American Surety Co. v. Baldwin, 287 U.S. 156, 166.

17. See Donovan v. City of Dallas, 377 U.S. 408, 412.

18. Hart and Wechsler, The Federal Courts and The Federal System, 1057.

September 1, 1964, injunction. Koehring says that Hyde should have appealed from the restraining order, and having failed to do so, may not question the adjudication of civil contempt. When this case was here before we held that the contempt order was so related to the injunction that both could be considered on a § 1292(a)(1) appeal.[19] We believe that the same conclusion is justified on this appeal. In United States v. United Mine Workers of America, 330 U.S. 258, 294-295, no appeal was taken from a temporary restraining order and the court said that there could be no sanctions in civil contempt for violation of an erroneous order. The March 11 order was in effect for only ten days. The general rule is that such orders are not appealable under § 1292(a)(1).[20] The failure to appeal from the temporary order does not foreclose consideration of the validity of that order on this appeal from the injunction and civil contempt judgment which were later entered.

To hold otherwise would permit a private litigant to take advantage of an error which it provoked in the first instance. The law affords a remedy for a right violated but does not grant relief to the perpetrator of a wrong.[21] A prosecution for criminal contempt vindicates the authority of a court regardless of whether it was properly exercised. Civil contempts provide a remedy for a party who has been injured by the violation of a court order. The right to such remedy "falls with an injunction which events prove was erroneously issued."[22] Accordingly, the adjudi-

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19. Hyde Construction Co. v. Koehring Co., 10 Cir., 348 F. 2d 643, 647, reversed on other grounds 382 U.S. 362.

20. See Pan American World Airways, Inc. v. Flight Engineers' International Association, 2 Cir., 306 F. 2d 840, 841-842, and Pennsylvania Motor Truck Association v. Port of Philadelphia Marine Terminal Association, 3 Cir., 276 F. 2d 931.

21. Salvage Process Corporation v. Acme Tank Cleaning Process Corporation, 2 Cir., 86 F. 2d 727.

22. United States v. United Mine Workers of America, 330 U.S. 258, 295.

cation for civil contempt and the penalty imposed therefor cannot stand.

Hyde urges us to order the dismissal of the case on the ground of res judicata. We decline to do so. The case is here on the sole issue of the propriety of the denial of the motion to dissolve the injunction. Our decision on res judicata is limited to the application of that principle to the question of the jurisdiction of the Mississippi courts to proceed with the state trial. The merits are not before us. The plea of the application of the bar of res judicata to the merits, and all other questions pertaining to the merits of the controversy, must be decided by the district court in the first instance.

The injunction is dissolved. The judgment for civil contempt is vacated. The case is remanded to the district court for further proceedings consistent with this opinion.

APPENDIX G

Excerpt from Brief of Respondent on Petition of Koehring (No. 567) for Certiorari Review of Order Overruling Motion to Dismiss Appeal. (Certiorari Denied 385 U.S. 949, 87 S.Ct. 323)

CASES IN POINT

While the mandate of the Supreme Court is controlling upon all matters within its compass, this does not mean that lower courts may not freely proceed upon undecided issues. *Sprague* v. *Ticonic Nat. Bank,* 307 U.S. 161, 59 S. Ct. 777, 83 L. Ed. 1148.

A case closely in point on its facts is *Christoffel* v. *United States,* (C.A. D.C. Cir., 1954) 214 F.2d 265, cer. den. 348 U.S. 850, 75 S. Ct. 75. The opinion states, in part, as follows:

"Appellant's conviction of perjury was affirmed by this court in Christoffel v. United States, 84 U.S. App. D.C. 132, 171 F.2d 1004, but reversed by the Supreme Court, 338 U.S. 84, 69 S. Ct. 1447, 93 L. Ed. 1826. Upon retrial appellant was again convicted and we affirmed, 91 U.S. App. D.C. 241, 200 F.2d 734. He again petitioned the Supreme Court for a writ of certiorari. Without briefs on the merits or argument the Supreme Court in a single *per curiam* order granted certiorari, vacated the judgment of this court and remanded the case to the District Court for resentencing under 18 U.S.C. § 231 (1946).[1] Christoffel v. United States, 345 U.S. 947, 73 S. Ct. 868, 97 L. Ed. 1371. This was done. Christoffel again appeals, raising questions not connected with the resentencing which occurred pursuant to the mandate of the Supreme Court, but directed to the earlier District Court proceedings which preceded our decision in 91 U.S. App. D.C. 241, 200 F.2d 734.

"The Government urges that since the mandate of the Supreme Court required, in addition to vacation of our judgment, only resentencing of Christoffel by the District Court, we are without jurisdiction on the present appeal to consider questions unrelated to the resentencing itself.

"We may not review action taken as required by a mandate of the Supreme Court. It is for that Court to construe its own mandate as to all matters encompassed by it. In re Sanford Fork & Tool Co., 160 U.S. 247, 255-256, 16 S. Ct. 291, 40 L. Ed. 414; Gaines v. Rugg, 148 U.S. 228, 238, 13 S. Ct. 611, 37 L. Ed. 432; Ohio Oil Co. v. Thompson, 8 Cir., 120 F.2d 831, certiorari denied, 314 U.S. 658, 62 S. Ct. 112, 86 L. Ed. 528. But the mandate is controlling only as to matters within its compass. Lower courts are free as to other matters over which they have jurisdiction. Sprague v. Ticonic Nat. Bank, 307 U.S. 161, 168, 59 S. Ct. 777, 83 L. Ed. 1184; In re Sanford Fork & Tool Co., supra; Mason v. Pewabic Mining Company, 153 U.S. 361, 14

S. Ct. 847, 38 L. Ed. 745; Illinois Bell Telephone Co. v. Slattery, 7 Cir., 98 F.2d 930; Id., 7 Cir., 102 F.2d 58, certiorari denied, 307 U.S. 648, 59 S. Ct. 1045, 83 L. Ed. 1527; Ohio Oil Co. v. Thompson, supra."

It is equally settled that a lower court may examine the opinion and mandate to determine what was, in fact, encompassed within the command of the mandate to the end that matters not so encompassed may be considered in the usual manner. As stated by the Eighth Circuit in *Ohio Oil Co.* v. *Thompson*, (C.A. 8th, 1941) 120 F.2d 831, 835:

"It often happens that the appeal to the Supreme Court does not involve all the issues pending in the inferior court; or that the decision and mandate of the Supreme Court leave some question open for the determination of the inferior court; or that in further proceedings in which the appeal occurs new issues may arise and new parties may join or be joined in the litigation. In all such cases the decision of the lower court upon such matter may be reviewed by the proper court. Ex parte The Union Steamboat Company, 178 U.S. 317, 319, 20 S. Ct. 904, 44 L. Ed. 1084; In re City of Louisville, 231 U.S. 639, 645, 34 S. Ct. 255, 58 L. Ed. 413; Mason v. Pewabic Mining Co., 153 U.S. 361, 14 S. Ct. 847, 38 L. Ed. 745; Illinois Bell Telephone Co. v. Slattery, 7 Cir., 98 F.2d 930; Id., 7 Cir., 102 F.2d 58. On remand the inferior courts are free as to all issues not within the compass of the mandate. Sprague v. Ticonic Nat. Bank, 307 U.S. 161, 168, 59 S. Ct. 777, 83 L. Ed. 1184.

"The decision of the district court of issues not submitted to the Supreme Court, of new issues, and of questions left open may be appealed to the Circuit Court of Appeals in all cases where that court would otherwise have jurisdiction. Mason v. Pewabic Mining Co., supra; Illinois Bell Telephone Co. v. Slattery, supra.

"In appeals to this court from decisions of the district court on questions arising in proceedings subsequent to the mandate of the Supreme Court, we may examine the opinion and mandate of that court to determine whether or not the decision is upon a question left open, upon a new issue, or upon some matter properly appealable to this court. . . ."

The distinction between the "construction" of a mandate and an examination of it to determine what was decided and what left open was the subject of discussion in *Illinois Bell Telephone Co.* v. *Slattery,* (C.A. 7th, 1938) 98 F.2d 930, wherein the Court, after noting that the particular issue presented to the Court of Appeals had not been passed upon by the Supreme Court, said:

"It would seem that the construing of a mandate presupposes that a problem has been presented to an Appellate Court and that the Court has passed upon the problem and returned it to the lower Court with its command. . . ."

In *Re Sanford Fork & Tool Company,* 160 U.S. 247, 16 S. Ct. 291, 40 L. Ed. 414, the Court said:

"When a case has been once decided by this court on appeal, and remanded to the circuit court, whatever was before this court, and disposed of by its decree, is considered as finally settled. . . ."

ALSO

". . . But the circuit court may consider and decide any matters left open by the mandate of this court; and its decision of such matters can be reviewed by a new appeal only. Hinckley v. Morton, 103 U.S. 764; Mason v. Mining Co., 153 U.S. 361, 14 S. Ct. 847; Nashua & L. R. Corp. v. Boston & L. R. Corp., 5 U.S. App. 97, 2 C.C.A. 542, and 51 Fed. 929. . . ."

In *Ex parte Union Steamboat Company,* 178 U.S. 317, 20 S. Ct. 904, 44 L. Ed. 1084, the Court said:

". . . The inferior court is justified in considering and deciding any question left open by the mandate and opinion of this court, and its decision upon such matter can only be reviewed upon a new appeal to the proper court (Re Sanford Fork & Tool Co., 160 U.S. 247, 256, 40 L. Ed. 414, 416, 16 Sup. Ct. Rep. 291); and the opinion of this court may be consulted to ascertain exactly what was decided and settled. . . ."

And when a lower court looks to see what was encompassed within the mandate to determine the "law of the case" thereby established, the search is to ascertain what was actually decided by the higher court.

As stated in *Hansen & Rowland* v. *C. F. Lytle Co.*, (C.A. 9th) 167 F.2d 998:

". . . The principle here applicable is that a judgment of reversal by an appellate court is an adjudication only of matters expressly discussed and decided, which become the law of the case in further proceedings on remand and re-appeal. Mutual Life Ins. Co. v. Hill, 193 U.S. 551, 553, 554, 24 S. Ct. 538, 48 L. Ed. 788; Wolff Packing Co. v. Court of Industrial Relations, 267 U.S. 552, 562, 45 S. Ct. 441, 69 L. Ed. 785; Hartford Life Ins. Co. v. Blincoe, 255 U.S. 129, 135, 136, 41 S. Ct. 276, 65 L. Ed. 549; Georgia Railway & Electric Co. v. Decatur, 297 U.S. 620, 623, 624, 56 S. Ct. 606, 80 L. Ed. 925; New York Life Ins. Co. v. Gamer, 9 Cir., 106 F.2d 375, 376, 377; cf. Angel v. Bullington, 330 U.S. 183, 192, 193, 67 S. Ct. 657, 91 L. Ed. 832."

In *Mutual Life Insurance Co.* v. *Hill*, 183 U.S. 551, 24 S. Ct. 538, 48 L. Ed. 788, the leading case on the subject, the Court said:

". . . When a case is presented to an appellate court it is not obliged to consider and decide all the questions then suggested or which may be supposed likely to arise in the further progress of the litigation. If it finds that in one respect an error has been com-

> mitted so substantial as to require a reversal of the judgment, it may order a reversal without entering into any inquiry or determination of other questions. While undoubtedly an affirmance of a judgment is to be considered an adjudication by the appellate court that none of the claims of error are well founded—even though all are not specifically referred to in the opinion—yet no such conclusion follows in case of a reversal. It is impossible to foretell what shape the second trial may take or what questions may then be presented. Hence the rule is that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided. . . ."

Hill was followed on the point in *Chas. Wolff Packing Co.* v. *Court of Industrial Relations*, 267 U.S. 552, 45 S. Ct. 441, 69 L. Ed. 785.

In *Hartford Life Ins. Co.* v. *Blincoe*, 255 U.S. 129, 41 S. Ct. 276, 65 L. Ed. 549, the Court, in applying the rule, said:

> ". . . Certainly omissions do not constitute a part of a decision and become the law of the case, nor does a contention of counsel not responded to. . . ."

Ballard v. *United States*, 330 U.S. 183, 67 S. Ct. 657, 91 L. Ed. 832, holds that a respondent to a petition for certiorari to the Supreme Court does not waive points not presented by the petition for decision.